

ALSO: Who Can Lay Claim to Blackness?

# Harvard Law

Summer 2007

*bulletin*

# CON

# LAW goes

# PRO

# active

SCHOLARS ARE weighing in on constitutional issues, from war powers to warrantless surveillance, from the Takings Clause to the Suspension Clause, from habeas corpus to the right to bear arms. Lawmakers and courts are listening.



## Con Law Takes Center Stage

With the ongoing war in Iraq and fight against terrorism, questions involving the balance to strike among values of security, liberty and privacy are more pronounced today than at any time in recent memory. At such moments, the work of constitutional law scholars gains special urgency—a fact reflected in the number of HLS faculty members now on the front lines in critical national debates.

In this issue of the Bulletin, you'll read about how our constitutional scholars are producing work that is reverberating in classrooms, Congress and the courts, on issues ranging from the scope of congressional war powers to the new restrictions on the availability of the writ of habeas corpus. Our depth in constitutional law—always impressive—is now even greater, thanks to the recent arrivals of Noah Feldman, Jack Goldsmith, Daryl Levinson, John Manning '85, Gerald Neuman '80, Mark Tushnet and Adrian Vermeule '93.

But war and terrorism aren't the only areas of focus of our constitutional law faculty. In this issue, Mark Tushnet, an expert on the Second Amendment and the debate over gun control, guides us through a recent ruling that may compel the Supreme Court to offer a more definitive interpretation of the amendment. In another hot-button area—the Takings Clause—Professor Laurence Tribe '66 recently argued an important case in the Court, and was ably assisted by

students in our terrific Supreme Court litigation clinic. Likewise, Professor Carol Steiker '86 recently won a trio of death penalty appeals in the Court, helped by students in her classes.

You will also get a look here at the important contributions of two alumni whose work is concerned with constitutional questions. Glenn Fine '85, the inspector general at the Department of Justice, has won bipartisan plaudits for his internal investigations of that department's activities, including in the area of national security law. A recent graduate, HRH Princess Sonam Wangchuck LL.M. '07 of Bhutan, is helping her country make the transition from an absolute monarchy to a constitutional democracy.

Finally, we pay tribute to two retiring professors, Bernie Wolfman and Bill Andrews '55—eminent tax scholars and beloved teachers. In the fall, look for similar tributes to Arthur Miller '58 and Paul Weiler LL.M. '65, who also completed their storied HLS teaching careers this year.

In all of these accounts, you will see how our faculty, students and alumni are carrying on Harvard Law School's great tradition of public service. I am enormously gratified by all that they are doing, and I believe you will be too.

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*Our depth in constitutional law—always impressive—is now even greater*



A handwritten signature in black ink, which reads "Elena Kagan".

DEAN ELENA KAGAN '86



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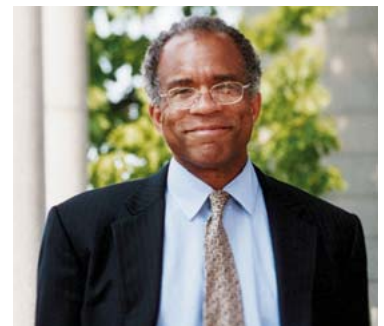
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## LETTERS

*“It is precisely when things are settling into a comfortable consensus between advocates on the left and the right that we most need to take a fresh, critical look.”*

—ASSISTANT PROFESSOR JEANNIE SUK '02

### MANY REASONS FOR PALESTINIAN ANGER

THE BULLETIN'S SPRING issue highlighted Professor Alan Dershowitz's statement: "The long history of Palestinian terrorism against Jews, which began in 1929, was motivated by religious bigotry." The charge is grossly overstated and misleading. There have been lots of reasons for Palestinian anger and violence. In the 1920s and '30s, this certainly stemmed in large part from the Palestinians' realization that the Zionists then immigrating in large numbers were not like the Jews who had come in earlier centuries; the new arrivals intended to convert Palestine into their own Jewish state, thus denying the existing Arab Christian-Muslim majority the right of self-determination. In later years, many Palestinians who were driven from and/or denied the right to return to their homes had reason apart from religious bigotry to be angry at Israelis.

It's depressing that, in this country, one can be reasonably sure that if someone like ex-President Carter publishes a serious critique of Israel he will be subjected to widespread vilification and intimidation—while Professor Dershowitz can rest assured that if he fires off an over-the-top slander of a whole Arab people it will be picked up and widely circulated by the media as an interesting comment.

JOHN POOLE '59  
Washington, D.C.

### CONNECTICUT'S APPROACH TO PROTECTIVE ORDERS

I WAS PLEASANTLY surprised to see the brief article on domestic violence and protection orders in the Spring 2007 issue of the Bulletin. Professor Jeannie Suk's attention to victims of DV who seek protection through the criminal justice system is very important, as

positive change may be set in motion by her article on this major societal problem.

One example of a judicial system addressing the problems raised may be found in Connecticut, where, when someone in a household is arrested for DV, an initial criminal protective order is issued, yet the court works with the victim to determine what longer-term protective order should be made. The Criminal Court has a family services officer who meets with the victim to discuss his/her concerns and whether the protective order should include a more restrictive "no contact" order to prevent the perpetrator from returning to the home or a less restrictive order that could allow the defendant to return home. The court also notifies the victim when the protective order is due to expire so that she/he can seek further restraints, if needed. While the measures applied in Connecticut may not be perfect solutions to paternalism and ingrained bias against women, they are welcome steps in the right direction.

DAHLIA O.F. GRACE '97  
Bridgeport, Conn.

### A DIFFERENT VIEW OF REALITY

AS A LEGAL services lawyer for most of the last 15 years, I have handled my share of domestic violence restraining orders. I have seen them used in excess, and used where they were not appropriate. I once saw a landlord try to use a harassment restraining order in lieu of an eviction. But nothing I have seen prepared me for Professor Suk's diatribe against protection orders in the Spring 2007 Bulletin ("When do protection orders go too far?"). I have not read, and do not comment here on, the (presumably) longer, more nuanced piece she wrote for The Yale Law Journal on this topic.

In the Bulletin, she says, without

qualification: "The criminal justice system's growing control of the home harms women." Really? Does that apply to the woman I know whose husband hit her upside the head with an iron and then jumped on her stomach? How about the woman whose ex threw a brick through the windshield of her car as she drove down the street?

The real irony here is that Professor Suk seems to be staking out an ideologically driven position in one of the few areas where advocates from the left and right have found common ground. Conservatives—traditionally concerned with crime issues—have discovered that domestic violence is one of the primary sources of violent crime in the U.S., even as advocates for women's rights have recognized the centrality of fighting domestic violence in the struggle for women's equality. Professor Suk's comments recognize neither of these dominant realities.

WILLIAM Z. KRANSDORF '92  
New York City

**ASSISTANT PROFESSOR SUK replies:** *It is precisely when things are settling into a comfortable consensus between advocates on the left and the right that we most need to take a fresh, critical look at what is happening on the ground. Without a doubt, there are many cases in which abused women seek and need protection orders. Reflexive extrapolation from those cases to the view that prosecutors should invariably and automatically seek long-term protection orders even in misdemeanor cases over the women's objection is precisely the kind of well-meaning but erroneous reasoning that creates the practices that my article examines. And yes, these practices can harm women generally, without harming every woman in particular—a simple point of rational policy that I would hope advocates like Mr. Kransdorf could embrace.*

# The Purity of the Strain

Who can *lay claim* to *BLACKNESS*?

**PROFESSOR  
RANDALL KENNEDY**  
*"I completely disagree  
with this defining of who  
is black."*

Since presidential hopeful Sen. Barack Obama '91 launched his campaign earlier this year, some have questioned whether Americans are ready to elect a black president. Others, in particular African-American writer Debra Dickerson '95, have denied that Obama is truly black, since he is not the descendant of West African slaves. Professor Randall Kennedy is the author of several books on race in America and is currently working on another about the politics of racial betrayal and the use of the "sellout" label. We ask him to comment on the questioning of Obama's blackness.

I completely disagree with this defining of who is black. But frankly, under all sorts of conditions, Barack Obama would be. When the great W.E.B. Du Bois, the first black to get a Ph.D. from Harvard, was once asked this question, he said his definition of who's black is, in a Jim Crow South, who's made to sit at the back of the bus? Well, if segregation



were still in existence, there is no question but that Barack Obama would have to sit at the back of the bus.

There are other definitions. But most white people see him as black; most black people see him as black. And most important, he sees himself as black.

As for the idea that you have to be a descendant of slaves, there are lots of black people in the United States, and I guess some people know their family trees well enough to establish that, but a lot of people don't.

You can't say that you are a black American if you look in your family tree and it turns out that your forebears were slave owners? There *were* black slave owners. And what about free blacks? It's not altogether clear that all the blacks who were initially brought over here were slaves. Suppose they were freed?

And then what about blacks from other parts of Africa? Not all the blacks who were sold as slaves in the United States were from West Africa.

Although I reject these definitions of who's part of the group, I do think that some of the discussion about Obama and his background is related to what I'm tackling in my current book. I think the majority of black people will have great hopes riding with him and will intuitively be for him and be proud of him and want him to do well. There will be an appreciable number, however, because of the dynamics that I outline, who will be somewhat skeptical. They know that this guy has a white parent. They know that this guy went to Harvard Law School. Some people are going to ask themselves: Why is he so well-liked among all of these white people? Their antennae are going to go up. There is going to be a certain amount of anxiety. And I think some of the talk of Barack Obama's racial authenticity is related to that. And that's an issue that any black person attaining success in a multiracial environment will have to face. \*

## Diplomat Rising

An Iranian lawyer,  
*already an envoy of sorts*, hopes  
to make it *OFFICIAL*

By *Mariah Robbins*

LAST FALL, WHEN most new LL.M. students were just settling into their studies in Langdell Hall, Sajjad Khoshroo '07 found himself on the other side of Harvard Square—and in the middle of a political demonstration. As Mohammad Khatami's personal assistant and interpreter, he accompanied the former president of Iran to a conference at the John F. Kennedy School of Government.

Khatami's trip—the most significant diplomatic visit since the United States and Iran severed relations in 1980—caused a stir. Massachusetts Gov. Mitt Romney '75 refused to give him state police protection, calling him a “terrorist.” Two hundred anti-Khatami protesters lined up outside the Kennedy School, chanting “Shame on Harvard.”

What most of the protesters didn't know, says Khoshroo, was that Khatami—an advocate of dialogue with the U.S.—was facing just as much criticism, if not more, from the new conservative administration in Tehran.

The son of a career diplomat, Khoshroo grew up fluent in English and Farsi in Tehran, New York and Canberra, Australia. He worked as an English-language journalist while earning his law degree in Iran, writing on the oil and gas sector, and attracted Khatami's attention in early 2006, shortly after the president left office. “I was asked if I was interested in accompanying him on his travels and writing his speeches in English,” he recalls. “There was an element of trust because of my father's position.”

Soon, Khoshroo was interpreting for Khatami in New York; Doha, Qatar; and Kuala Lumpur, Malaysia.



He translated during Khatami's meetings with Archbishop Desmond Tutu and former U.N. Secretary-General Kofi Annan. He continued working for Khatami even after enrolling at HLS, where he focused on international finance—and on his country's future.

In spite of international sanctions and internal obstructionism, says



SAJJAD KHOSHROO accompanied former Iranian President Mohammad Khatami to a Kennedy School event last fall. Khatami, says Khoshroo, is an advocate of dialogue with the U.S.

Khoshroo, "I think any change in Iran has to come from the Iranian people." He is optimistic about their desire for progress, citing Iran's thriving blogging community. "There's a booming online culture, especially in the cities," he says.

As for U.S.-Iranian relations, Khoshroo says a large majority of Iranians favor normalizing ties with the U.S., but he believes that matters weren't helped in 2002 when President Bush labeled Iran part of the "axis of evil." At the time, Iran's nuclear program had been suspended and the country had been helping with the U.S. invasion of Afghanistan. "The comment came out of nowhere," he says, "and insulted all Iranians."

At the Kennedy School last fall, Khoshroo met Michael Gerson, who wrote the "axis" speech for President Bush. "I introduced myself," Khoshroo remembers. "I said, 'I am from an axis-of-evil country. This is who we are. We are these evil people you talk about.'" Gerson said the phrase was aimed at the Iranian government, not its people. Khoshroo replied that the same distinction could be made when Iranians refer to "the Great Satan."

"In either instance," Khoshroo says now, "you can't use that kind of language. It's not progress."

Khoshroo believes that Islam will continue to dominate Iran's political landscape, but he predicts that a more modern, liberal interpretation of the Quran will ultimately prevail.

He worries, though, that hard-liners may cause younger, reform-minded Iranians to become disenchanted with politics: "If they don't vote, then the conservatives will continue to win."

Hanging in the balance will be Khoshroo's hopes for a political career. "I would love to be Iran's first ambassador to the United States since the revolution," he says. "That's something I would love to do for my country." \*



## A Free Town Captured Focusing on *WAR CRIMES* through *law and film*



IN SIERRA LEONE, Rebecca Richman Cohen '07, right, looked at the impact of atrocities.

By Christine Perkins

HOW SHOULD SOCIETIES deal with the aftermath of cataclysmic war and mass atrocities?

It's a question documentary filmmaker Rebecca Richman Cohen '07 has asked former Nuremberg prosecutors. Last summer, it was one she confronted herself as she defended a former rebel leader on trial before the Special Court for Sierra Leone.

During her 2L year, Cohen—who has worked on several films, including Michael Moore's "Fahrenheit 9/11"—produced a documentary on the legacies of the first international war crimes tribunal at Nuremberg. A few months later, she traveled to Freetown in Sierra Leone to participate in a new type of tribunal.

For more than a decade, the West African nation was ravaged by civil war as factions battled for control over the country's government and diamond mines. In 2002, the Special Court was established by the U.N. and Sierra Leone to bring those bearing the

greatest responsibility to justice—the first tribunal operating under both domestic and international law, located in the country where the crimes on trial occurred.

When Cohen arrived at the Special Court, she was assigned to the defense team for Alex Tamba Brima, one of 11 men indicted (including former Liberian President Charles Taylor). As an alleged leader of the Armed Forces Revolutionary Council (notorious for hacking off limbs), Brima faced 14 counts of war crimes and crimes against humanity.

Cohen says she knew her client wasn't a saint. She saw him—like the criminal defendants she represented the previous summer when she worked for the Bronx Defenders—as a vulnerable human being in need of an advocate. Moreover, she believed working for his defense was an opportunity to strengthen the legitimacy of the court, "bringing the rule of law to bear on these really egregious atrocities."

It also gave her a front-row look at the working of transitional justice. Of all the international tribunals, she says, the Special Court has "done it best," training local lawyers and doing vigorous outreach.

But as a member of the defense team, she became aware of the complexity of holding individuals responsible for collective violence. Like defendants at Nuremberg who were part of the Nazi killing machine, her client was being prosecuted for the crimes of many. "[But] this is not the Nazis—this is guerrilla warfare," she observes. "It's splintered and factioned." And unlike the crimes of the Third Reich, those in Sierra Leone are not well-documented.

"The Nazis left a great paper trail. Here, you have to establish command responsibility through the testimony of insider witnesses who have a great stake in how this story is shaped," she says. Some of them may have committed crimes as heinous as those charged against the defendants.

On June 20, the court handed down its first judgments, finding Brima and two others guilty on 11 counts. Cohen has returned to Sierra Leone to begin her next film, a documentary on the trial of a leader of another warring faction.

"The Nuremberg film looked at the trial. I hope that the next one takes a much broader view of transitional justice," says Cohen. Many of the root causes of the conflict—including disenfranchisement and vast unemployment—still exist, she explains, and in order to guarantee justice and protect the peace, reconciliation and development efforts must work in concert.

"In the aftermath of war, you often find a great moral vacuum; law does some of the work and not all of the work. I hope my film communicates that." \*





## Corollaries, Legal and Otherwise

*Viewing* the First Amendment in a  
*PHILOSOPHICAL* context

THE FRAMERS OF  
THE CONSTITUTION  
were avid readers  
of philosophers like  
Locke and Rousseau.

After taking Professor Martha Nussbaum's spring class Religion and the First Amendment, students are certainly familiar with the Supreme Court rulings on the public display of the Ten Commandments. But they can also quote Locke, Rousseau and Rawls.

Nussbaum is a philosopher and legal scholar who was visiting from the University of Chicago. While her class involved a full survey of relevant First Amendment cases, she challenged students (drawn from the college and graduate schools, including the law school) to see the law not just through existing cases, but also through the scrim of philosophical argument. In part, this meant asking where the

world's philosophers might come down on our religious and ethical traditions, and where the Court, in making law, has either upheld those traditions or set them aside.

"I want students to understand how general philosophical principles and legal decision-making are related," said Nussbaum. "That is, to see that the legal tradition does incorporate some general principles that are also debated in the philosophical tradition, and to think about those relationships."

Nussbaum, who is writing a book on the First Amendment and religion, believes those primarily interested in law get two benefits from studying the philosophical texts ("in addition to the benefit of their intrinsic value and beauty"). "First, the framers were steeped in philosophy, and these ideas influenced their formulations," she

said. "So if one is interested in the history of the religion clauses, one should understand where the framers were coming from. Second, the philosophical texts make clear and formulate rigorously some abstract goals and principles that are embedded in the legal tradition, so that studying them helps us think better about those goals and principles."

Phil Tedesco '09 agrees. He says reading Locke's "A Letter Concerning Toleration," and Rawls' "Political Liberalism" gave him a framework for the Supreme Court decisions on issues like school prayer.

"You're working through it and thinking, Hey, these philosophers had a vision for society," Tedesco said. "You could just see the whole arc. It makes you think about what a just society can be." \* —Flynn Monks

# Boardwalk, Park Place— and The Hague

In a world of *antitrust casebooks*,  
some much-needed *COMPETITION*

By Margaret A. Salinger

**Headlines on any given day** underscore the increasing globalization of antitrust law and economics—for example, “Apple iTunes charged by EC with restrictive pricing practices.”

But this is hardly news to HLS Professor Einer Elhaug ’86. “Modern antitrust law *is* global,” says Elhaug, co-author of the newly published book “Global Antitrust Law and Economics” (Foundation Press, 2007), written with Damien Geradin, a professor at Tilburg University in the Netherlands. In the iTunes case, Apple’s lawyers will encounter a complicated web of rules and regulations that didn’t exist prior to the EC’s formation, and they will be required to consult with experts and lawyers in a number of countries, Elhaug notes.

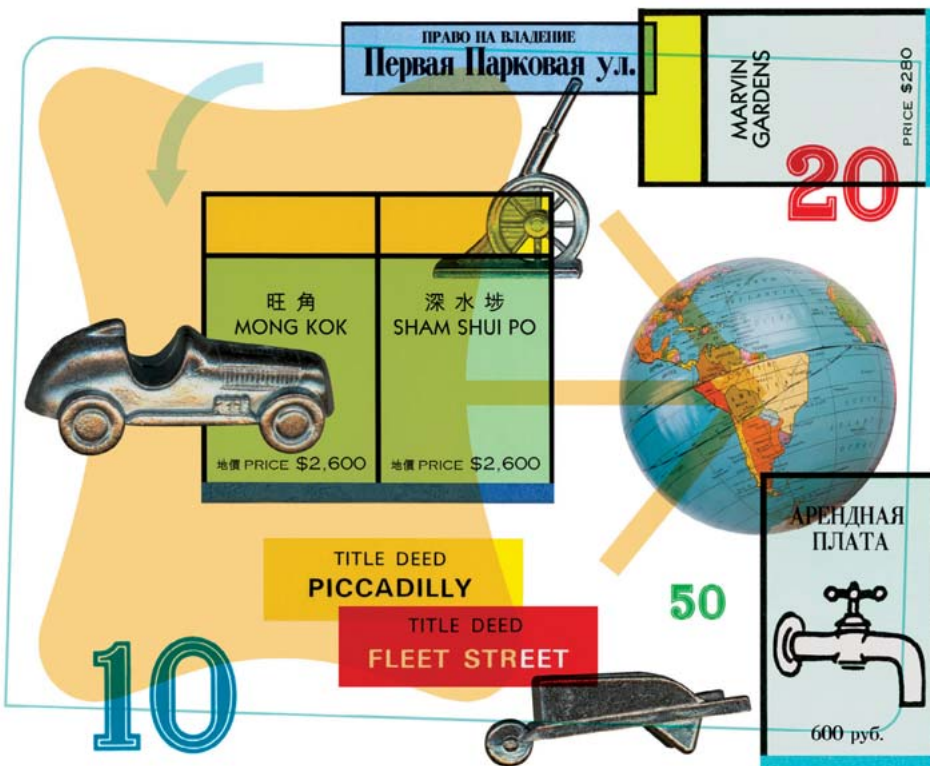
Elhaug has been teaching students about the increasing cross-border aspects of competition law for some time, but he says that when he looked for a textbook on global antitrust that matched Harvard’s leading-edge teaching on the subject, he found that traditional antitrust casebooks were “rapidly becoming outmoded,” with their typical focus on the law of only one nation.

Moreover, he notes, when he was in practice before joining the HLS faculty, he was surprised to learn that decision-making wasn’t always based on the antitrust doctrines he had studied in law school. “Agencies have a ‘secret body of law,’ and only insiders know what’s really going on,” he says. Antitrust economics, he explains, are very different from pure economics—what makes rational sense in a perfect world—and are instead concerned with “administrability and the implementation of economic concepts in a world where information is limited, decision-makers are imperfect, adjudication is lengthy and costly, and parties are strategic both in litigation and in responding to different substantive rules.”

Thus, he decided to produce what he calls “the first law book ... to cover these issues in a global way,” and in real-world terms.

One focus that distinguishes modern global antitrust law and practice

*As a new casebook shows,  
antitrust law has become  
truly global in scope*



## Recent FACULTY BOOKS

from that of the past, he says, is “the dominance of the economic model of analyzing antitrust and competition policy.” The way in which Elhauge and Geradin convey the increasing use of economics as a common language across various regimes makes the book “enormously teachable,” says Robert H. Lande ’78, a leading antitrust expert and a professor at the University of Baltimore School of Law.

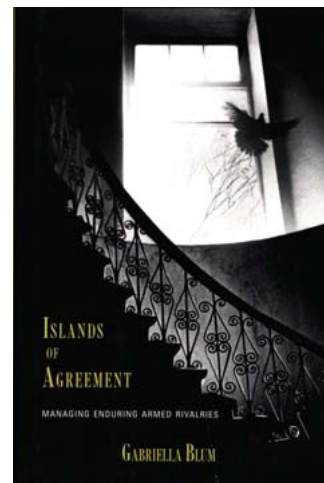
The book will be valuable for interested students and practitioners at every level, from beginners to “upper-level students ... and antitrust lawyers with an international practice,” Lande says. Discussion of recent advances in economic theory—and their impact on antitrust law—is accompanied by detailed mathematical formulas in extensive footnotes for those interested in a deeper level of analysis.

For each of the various areas of antitrust law covered in the book, the authors provide background history and context, and then analysis of the laws and general legal standards of the U.S., the EC and other countries—the latter treated in more depth when they present a “third way” of addressing an issue.

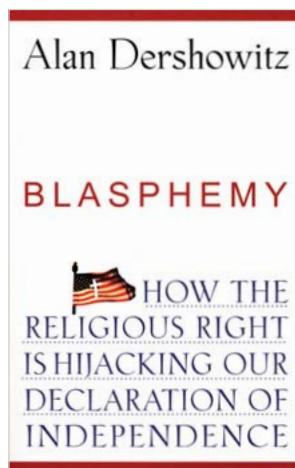
The authors also pose intriguing questions designed to encourage students to think globally. Why, for example, did the Doha negotiations fail to achieve agreement on antitrust law and policy, when—as demonstrated in the text—agreement would have been in the rational economic interest of the very group of developing nations that prevented it? Readers are asked what policy choices they would have advised, and whether there should be an international antitrust regime or, instead, different regimes for differing political economies.

If there is a simple snapshot that can be offered to show the book’s usefulness on a global scale, it is that one of Elhauge’s S.J.D. students, Dina Waked LL.M. ’06, recently used an advance copy to teach an antitrust class of her own—in Egypt. And Lande used it, too—in a class he taught in Israel. \*

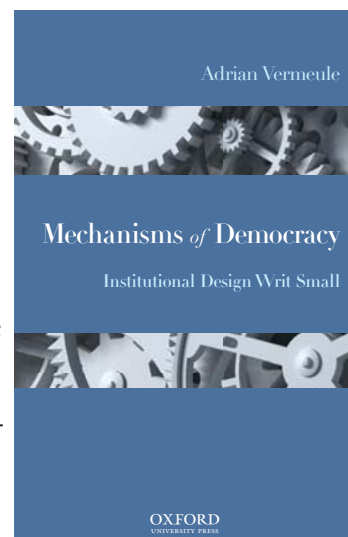
In “Islands of Agreement: Managing Enduring Armed Rivalries” (Harvard University Press, 2007), Assistant Professor Gabriella Blum LL.M. ’01 S.J.D. ’03 reconsiders the conventional theory and practice of international conflict resolution. Even where violent conflict exists, she argues, it is often only one facet of an ongoing interstate relationship. And Blum believes that within the most entrenched and bitter struggles, adversaries can carve out limited areas that remain safe or even prosperous.



In “Blasphemy: How the Religious Right Is Hijacking Our Declaration of Independence” (John Wiley & Sons, 2007), Professor Alan M. Dershowitz contends that fundamentalist Christian political activists are misusing the declaration to Christianize America. He accuses the Religious Right of twisting words and phrases in the declaration to suggest that the founding of the nation was based on Christian precepts. Dershowitz asserts that it is more than ironic that the document, written by Thomas Jefferson—who was a proponent of the separation of church and state—should be used in this way.



In his book “Mechanisms of Democracy: Institutional Design Writ Small” (Oxford University Press, 2007), Professor Adrian Vermeule ’93 argues that in established constitutional polities, law can and should—and to some extent already does—provide mechanisms of democracy, which he defines as small-scale institutional devices and innovations that promote democratic values of impartial, accountable and deliberative government. For example, one such mechanism—submajority voting—improves accountability by allowing democratic minorities to force majorities to confront important public issues. \*



## Windfalls Realized: Two giants of *TAX LAW* retire

How do we put a value on our (intellectual) capital gains? Or calculate the windfalls (to our minds) that have accrued from our original basis—in this case, from the date that William Andrews '55 joined the Harvard Law School faculty in fiscal year 1961 and the moment, a few reporting periods later, when Bernard Wolfman arrived in 1976? We can't—a perfect example of immeasurable, and invaluable, gains.

At the end of this past academic year, both scholars, who clarified the world of tax law for generations of lawyers over a combined 77 years, retired from teaching and joined their emeritus colleagues. Here, two former students pay tribute.

### William D. Andrews '55

#### ON THE RIGHT SIDE OF THE EQUATION

By Edward J. McCaffery '85

IT CAN BE lonely being a tax law professor. There are at most only a few dozen people who understand what you are doing, and most of them don't much care. I have often times felt sorry for Bill Andrews—or, better put, for the world in which his gifts are not well (enough) appreciated. Bill himself would never say that—he is gracious, kind and seemingly always happy.

I first encountered Bill when I was a student in his corporate tax class. Many students did not quite “get” Bill. But I loved the class, and the professor even more.

He was always in a bow tie and a suit that looked timeless, always willing to entertain a question or a badly incorrect answer, and make the best of it. There can be precious little logic in corporate tax—to this day, I cannot tell you, in any “deep” sense, why there is no boot in a B Reorg (years later, my students at Yale Law School would set this principle to a country-and-western tune)—but Bill would always try to find some.

Later I would teach from Bill's basic tax casebook, and his spirit would come back in full. Where else could you see Zeno's paradox, used to explain the concept of a “tax on a tax,” in the Old Colony case, complete with the answer that some infinite series converge?

There is much to admire about Bill's scholarship, but what I best know and love Bill from are three articles published in the Harvard Law Review, in 1972, 1974 and 1975—known to cognoscenti simply as Andrews 72, 74 and 75. Much of income tax theory in the 20th century was dominated by the so-called Haig-Simons definition of income, which holds essentially that Income equals Consumption plus Savings ( $I = C + S$ )—that all money or wealth (income) is either spent (consumption) or not (savings). Many have written about the income side of that equation: the importance of finding and taxing “all income, from whatever source derived.” The simple genius of Bill Andrews was to look to the right-hand, or uses side.

What we are taxing—in an income tax—is consumption plus savings. This change of perspective effected a Copernican revolution in our thinking about tax. Andrews 72 pointed out that, while the arguments for source neutrality are compelling, those for use neutrality are far less so—just maybe, “we” do not want to tax all consumption, like medical expenses or charitable contributions, equally. Then, Andrews 74 showed that the “worst inequities and distortions” derived from the inconsistent tax treatment of savings. The contemporary consumption tax movement was born. Andrews 72 and 74 are my favorite law review articles of all time, but they deserve a far better



APPRECIATED  
Bill Andrews, left, and  
Bernie Wolfman

compliment than that.

The last time I saw Bill was at a 30th birthday party for Andrews 74. (How many law review articles have birthday parties? How many of these are on tax?) Bill held up a copy of my book “Fair Not Flat” (my homage to him, more truth be told) and said to the assembled dozens: “There is a man who has written a book I wish I'd written.” The students, still puzzling over the equivalence, in present-value terms, of a tax deferred and a tax paid, barely took notice. But I did, and thought to myself, That's the best compliment I've ever gotten.

*Edward J. McCaffery is acting dean of USC Gould School of Law and professor of law, economics and political science.*



“I learned that theory matters [and] that lawyers can be a force for legal change.”

— HOWARD ABRAMS '80

to eliminate this peculiarity even though it reduced the taxes of the bar's most sophisticated clients. In 1986, General Utilities met its overdue demise. I learned from its repeal that the tax bar has an obligation to improve the law and that the members of the tax bar take that obligation seriously. I learned that theory matters, that lawyers can be a force for legal change and especially for positive legal change. I learned many things from Bernie Wolfman and this was as important as any.

When I left Harvard Law School to clerk at the Tax Court, Bernie put a book in my hands: a history of the old Board of Tax Appeals and how it was transformed into the modern United States Tax Court. I was becoming part of an institution, and to understand what that institution was, I had to know what it had been. The tax laws, the tax profession, the tax academy—all are institutions. To know what they are, know first what they have been. I learned that from Professor Wolfman. \*

*Howard Abrams is a professor at Emory School of law. This spring, he was a visiting professor at the University of California, Berkeley's Boalt Hall School of Law.*

## Bernard Wolfman

A MAN OF MORE THAN GENERAL UTILITY

*By Howard Abrams '80*  
BERNIE WOLFMAN HAS taught generations of tax students, and he will continue doing so for many years to come. I know that he has just announced his retirement from Harvard Law School after 31 years (and, including his time at Penn, a total of 44 years of teaching), and I have no knowledge of his future plans. But even if he retires to Tahiti incommunicado, he will be teaching students nonetheless because many of those he taught—I among them—will be teaching them. And as I learned tax, so I teach tax—or at least I hope it to be so.

Bernie was a magnificent teacher and a master of the Socratic method. While today's students are less exposed to that style of teaching, for those of us who learned from it, it was a thrilling experience. Phil Areeda '54, Paul Bator '56 and Bernie Wolfman were the three masters who (it seemed) barely spoke in class, and yet the learning was nonstop: We learned by doing rather than by watching, and many of us learned not only the law but a love of teaching. The Socratic method can impose harsh demands, but Bernie was not at all harsh; on the contrary, he was kind and treated us kindly both inside and outside the classroom. For those of us who teach tax, Professor Wolfman is

our ideal.

He taught me many things, the most often repeated of which was that the General Utilities doctrine corrupted subchapter C and had to go. We began in those days with corporate liquidations, a starting point that made great pedagogical sense in the era of General Utilities. Bernie's corporate tax casebook was all about the General Utilities doctrine, and the book was used everywhere and always to good effect. We spent most of a semester learning how Congress tried to rationalize the taxation of corporations and their shareholders, and how that effort failed—had to fail—because of General Utilities.

And we learned that the tax bar was working hard



## HEARSAY

### SHORT TAKES from faculty op-eds

#### Supreme Confusion

PROFESSOR CHARLES FRIED  
*The New York Times, April 26*

“[The Supreme Court’s decision in the partial-birth abortion case is] disturbing because Justice Kennedy fails to come to grips with his own jurisprudence, going so far as to say that because Congress was acting under its power to regulate interstate commerce, it needed only a rational basis to justify its decision. Where a fundamental right is involved, such an explanation is evidently wrong. It’s also disturbing because Justice Kennedy was not quite willing to embrace his own conclusion. He suggested that perhaps as applied in a particular case in which there was an increased health risk, the ban might be unconstitutional after all. What can that mean? The very complaint here was that the ban was unconstitutional because it applies in just such situations. Does the court contemplate a surgeon pausing in the midst of an operation in which he determines the banned procedure might be less risky, and seeking a court order?”

#### The Lessons of Dred Scott

PROFESSOR CHARLES OGLETREE JR. '78  
AND JOHANNA WALD

*The Boston Globe, April 5*

“[A] careful read of the nation’s history reveals a pattern more accurately described as an ebb and flow than a steady current drifting toward full equality. ... Each new restriction that we impose is always rationalized as

necessary—for ‘national security,’ for stemming illegal immigration, for punishing criminals, for rooting out ‘voter fraud’ or for preserving parents’ rights to choose their children’s schools. But we must remember that 150 years ago, the Dred Scott decision was widely justified as an effort to settle the divisive slavery question, to fend off the prospect of civil war and to strengthen the powers of the federal government. The questions at the heart of the Dred Scott case—about citizenship, belonging and participation—remain unresolved. As we stand at a crossroads, challenged by threats abroad and within, we, like the Supreme Court in 1857, risk being blinded by our own cultural assumptions. These threaten the admirable gains we have made during the past century and a half.”

#### Japan’s Uncomfortable History

ASSISTANT PROFESSOR JEANNIE SUK '02  
AND PROFESSOR NOAH FELDMAN

*The Wall Street Journal, March 13*

“Japanese Prime Minister Shinzo Abe has reopened old wounds in Asia with his defense of Japan’s participation in sex slavery during World War II. ... Japan needs to confront its own past as it decides the kind of nation it wants to be. ... It is also worth keeping in mind that the denial of responsibility is an ongoing harm. Unlike the victims of the Nazi slave labor camps, the comfort women [forced into brothels to be raped by Japanese soldiers] have never received formal reparations. The unofficial compensation scheme set to end this month was no substitute for

acknowledgment of responsibility—which is why many survivors refused to accept money from it. Mr. Abe apparently started down the path of denial to gain political support for his faltering premiership—itsself a disturbing comment on Japan’s continued unwillingness to come to terms with its crimes as Germany has. Any such support, unfortunately, is gained only at the expense of surviving victims—and of anyone who cares about the truth.”

#### Inside Jobs

PROFESSOR LUCIAN BEBCHUK LL.M. '80  
S.J.D. '84

*The Wall Street Journal, Jan. 6*

“Apple Computer announced a week ago the conclusions of a special board committee that examined the ‘improper dating’ of over 6,000 option grants during 1997-2002. The committee found no basis for having less than ‘complete confidence in [CEO] Steve Jobs and the senior management team,’ placing full responsibility for past problems on the company’s former CFO and general counsel. But the company’s report fails to dispel concerns about Apple’s governance. ... In particular, Mr. Jobs received in 2002 an award of at-the-money options to buy 7.5 million Apple shares, roughly 2 percent of the total shares then outstanding. The grant was backdated by two months, which significantly increased the award’s value. Surprisingly, Apple did not disclose the backdating of this large CEO grant in October when it announced the committee’s ‘key findings.’”



{SPECIAL SECTION}

# The CONSTITUTION

## Article I

**BATTLEGROUND**—*In wartime, the expertise of constitutional scholars is more important than ever.*

## Article II

**THE CONSTITUTION'S OMBUDSMAN**—*Justice Department employees are sworn to uphold the Constitution. But it's one man's job to hold them accountable.*

## Article III

**LAWYERS, GUNS AND MONEY**—*The D.C. Circuit says the Second Amendment guarantees an individual's right to bear arms. Activists are taking aim, and the Supreme Court may finally be within range.*

## Article IV

**ELEVATION**—*In the high-altitude Kingdom of Bhutan, the people's first constitution will protect their rights. It will also give them duties.*

## Article V

**VOX POPULI**—*How far can the government go when it tries to take private property without paying just compensation? An HLS professor brings the question before the Supreme Court.*



On war,  
anti-terrorism  
and executive  
power,  
constitutional  
scholars  
have a  
lot to say.  
Lawmakers  
are listening—  
and so are  
the courts.

*BY ROBB  
LONDON '86*

# B A T T L E G R O U N D S

**IN ONE WEEK LAST JANUARY**, two constitutional scholars from Harvard Law School testified in separate congressional hearings on the growing clash between Congress and the executive branch over war powers and other critical issues.

While it's not unusual for law professors to testify on Capitol Hill, the twin appearances by HLS faculty members that week neatly symbolized the urgency and importance of constitutional expertise and scholarship in wartime—and the prominent contributions that HLS professors have been making lately in some critical national debates.

“I don't think you can find any other faculty that's got this many people, with this many perspectives, addressing and doing new scholarly work on the issues ranging from the basic questions of how to respond to the terrorist threat all the way through the constitutional dimensions of congressional attempts to limit the continued use



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“Congress possesses substantial constitutional authority to regulate ongoing military operations,” says David Barron, “and even to bring them to an end.”

of troops in Iraq,” says David Barron ’94, one of the HLS professors who testified that week.

The academy has clearly been galvanized by the wars in Iraq and against terror, which have generated plenty of tough constitutional questions along with new tensions between the executive and legislative branches.

#### WAR POWERS AND ANTI-TERRORISM

In January, Barron appeared at a Senate Judiciary Committee hearing on Congress’ power to end wars, telling the members: “Congress possesses substantial constitutional authority to regulate ongoing military operations and even to bring them to an end.” He was also among a group of legal scholars who signed a letter to Congress earlier that month about the constitutionality of congressional efforts to limit

troop increases in Iraq. No stranger to Capitol Hill, he has worked recently with New York Sen. Charles Schumer ’74 on changes to a federal surveillance statute.

“Though congressional war powers are not plenary,” Barron told the Senate Judiciary Committee, “neither do they limit the legislature solely to reliance upon a complete termination of funding in regulating the scope, duration or size of a military operation. To the contrary, our constitutional tradition shows that measures such as those now being considered concerning military operations in Iraq—whether they place caps on troop levels, restrictions on the introduction of new troops or establish a date certain by which troops must be redeployed—are clearly constitutional exercises of well-established congressional war powers.”

Barron has developed his views in greater depth in a two-part article, written with Martin S. Lederman, a visiting professor at the Georgetown University Law Center, that is scheduled for publication in upcoming editions of the Harvard Law Review. In that piece, the authors upend what they describe as the well-

entrenched assumption that, as a matter of original constitutional intent and long-standing constitutional practice, operational or tactical matters are “for the president alone.” Constitutional history shows, they argue, that there is really only one “core prerogative” of the commander-in-chief—namely, a prerogative of superintendence when it comes to the military chain of command itself.

“It is that core power, rather than the one concerning tactics,” according to Barron and Lederman, “that ... cannot be taken away by statute.” They write: “The historical practice instead reflects an implicit assumption that the President, even in times of war, is bound by statutes and treaties directing the conduct of war (so long as they do not impede his superintendence of the armed forces).”

One conclusion of Barron and Lederman’s article: “[T]he Administration’s recent assertion of illimitable executive power appears to be an even more radical attempt to remake the constitutional law of war powers than is often recognized.”

But others—such as Noah Feldman, the newest constitutional scholar on the HLS faculty—warn against reading too many congressional war powers into the Constitution. Feldman has taken issue, for example, with legislation offered by Illinois Sen. Barack Obama ’91 that contained a timetable mandating the withdrawal of troops from Iraq. In a Slate magazine piece posted March 5, Feldman and NYU Law Professor Samuel Issacharoff write: “[O]nce Congress has authorized the president to fight, it has neither the competence nor the authority to tell him which troops should be placed where on the battlefield. Nor can it order him to withdraw particular troops—or particular numbers of troops—by a specified date, as Obama’s proposal, among others, would do.” Finally, they argue, Congress cannot limit the number of troops that may fight, because the tactical essence of war is the decision to place some number of soldiers in a particular place at a particular time.

“To give this power to Congress,” write Feldman and Issacharoff, would “leave the president without true command authority over his forces and the flexibility needed to respond to military exigencies.”

A separate but related question is what, precisely, Congress permitted the president to do when, a week after the Sept. 11 attacks, it passed the Authorization for Use of Military Force (to this day the central statutory enactment related to the war on terrorism). HLS Professor Jack Goldsmith has said that although the statute confers broad authority on the president comparable to that conferred by Congress in declared



wars, it also leaves many questions unanswered. In a widely cited 2005 Harvard Law Review article written with Curtis A. Bradley '88, Goldsmith suggests how courts should read the authorization's broad language to decide what kinds of executive action the statute does or does not authorize.

The piece was hailed by scholars of various ideological leanings as an important contribution on the authorization. Some, like Professor Mark Tushnet (also writing in the Harvard Law Review), replied that the Goldsmith-Bradley framework, though reasonable, reflects an overly optimistic view of the ability of Congress and the courts to guard against executive branch actions that pose a threat to the basic liberties of American citizens.

Professor Adrian Vermeule '93, who credits Goldsmith with sparking his own interest in terrorism scholarship, argues against overly hampering executive action during emergencies in a new book, "Terror in the Balance: Security, Liberty, and the Courts" (Oxford University Press, 2007), written with Eric Posner '91. In times of crisis, the executive's distinct advantages—such as expertise, decisiveness and secrecy—are valuable, Vermeule argues, whereas the advantages of the legislative branch and the courts, such as deliberation, are less useful. "During emergencies, courts and Congress should defer heavily to the executive and historically have done so," he told an audience at the American Enterprise Institute recently.

Vermeule's book adds to the growing terror-

If warrantless electronic surveillance violates the Constitution, Charles Fried says, “we are faced with a genuine dilemma.”

related literature by HLS faculty members. In 2002, Alan Dershowitz published “Why Terrorism Works: Understanding the Threat, Responding to the Challenge” (Yale University Press), followed a year later by Philip Heymann ’60, with “Terrorism, Freedom, and Security” (MIT Press). More recently, Heymann has written “Protecting Liberty in an Age of Terror” (MIT Press, 2005) with Juliette Kayyem ’95, who is now the undersecretary of homeland security in Massachusetts (see related story, p. 51).

#### WARRANTLESS ELECTRONIC SURVEILLANCE

Last year, Rep. John Conyers Jr., the House Judiciary Committee’s ranking Democrat and now its chairman, asked Professor Laurence Tribe ’66 to offer his opinion on the National Security Agency’s warrantless surveillance program, which was carried out without

following the procedures established by Congress in the Foreign Intelligence Surveillance Act of 1978. “The presidential program of surveillance at issue here is a violation of the separation of powers—as grave an abuse of executive authority as I can recall ever having studied,” Tribe wrote in a letter to Conyers and the committee. The government’s interception of electronic communications, he wrote, is subject to the control of Congress through a statutory scheme that is “the exclusive means by which electronic surveillance ... and the interception of domestic wire, oral and electronic communications may be conducted.”

Tribe’s analysis, Conyers later said, “confirms my suspicions that this is an utterly lawless and unconstitutional [program].”

Another HLS professor, Charles Fried, acknowledged that the surveillance might be legally problematic but added, “I am convinced of the urgent necessity of such a surveillance program.” In a December 2005 Boston Globe op-ed, he surmised that such surveillance involves “a constant computerized scan of all international electronic communications,” and then wrote that if such impersonal surveillance

does violate some constitutional norm, “we are faced with a genuine dilemma.”

“If the situation is as I hypothesize and leads to important information that saves lives and property,” Fried asked, “would any reasonable citizen want it stopped? But if it violates the Constitution, can we accept the proposition that such violations must be tolerated?”

#### WRITING ON THE WRIT

In a just-published article in the Harvard Law Review, Professors Richard H. Fallon Jr. and Daniel J. Meltzer ’75 offer a sweeping survey of the law of habeas corpus as it relates to detainees seized at home and abroad in the war on terror. To date, no one has produced a more comprehensive primer on the complicated permutations of jurisdictional issues and legal rights that depend on whether prisoners are seized in the U.S. or on foreign soil, whether they are citizens or aliens, whether they are held inside the U.S. or at U.S. facilities abroad, and whether or not the government deems them enemy combatants. Fallon says he hopes the article will be as helpful to practitioners and scholars as the seminal 2002 Yale Law Journal article on military tribunals by Tribe and Georgetown Law Professor Neal K. Katyal, “Waging War, Deciding Guilt: Trying the Military Tribunals.”

Much of the Fallon-Meltzer article, titled “Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror,” focuses on the combined effects of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. The first eliminated the availability of habeas corpus review—and virtually any other form of judicial redress—for aliens held in military custody at Guantánamo Bay. The second went even further, eliminating habeas and other forms of review for any alien, wherever seized or held, who has been determined by the U.S. government to have been properly detained as an enemy combatant or is awaiting such determination.

In addition to an exhaustive examination of the new legal landscape under the two acts, Fallon and Meltzer offer some assessments of their constitutionality: “We believe that [the] total preclusion of judicial review of challenges to conditions of confinement is unconstitutional,” they write, “because it contravenes a broader postulate of the constitutional structure of which the Suspension Clause forms a part: that some court must always be open to hear an individual’s claim to possess a constitutional right to judicial redress of a constitutional violation.”

Professor Gerald Neuman ’80 and other legal

scholars took a similar position recently in an amicus brief filed in the U.S. Court of Appeals for the 4th Circuit in the case of Ali Saleh Kahlal al-Marri, a Qatari student arrested and detained in the U.S. on terror-related charges. The Military Commissions Act's prohibition of habeas corpus jurisdiction for certain persons "is not limited to a particular span of years or the duration of a particular emergency," they wrote. "Instead, it decrees a permanent alteration of the federal habeas corpus statute"—which is barred by Article 1, Section 9 of the Constitution, the Suspension Clause.

In June, in a stinging rebuke to the government, a three-judge panel of the 4th Circuit ruled that the act did not bar al-Marri from pursuing habeas relief because he was lawfully in the U.S. at the time of his arrest. The panel decided the case on grounds of statutory interpretation and therefore did not reach the constitutional issue raised in the amicus brief. But the judges noted the persuasiveness of the argument that the act was not a valid exercise of congressional powers under the Suspension Clause.

Last year, while the act was still pending, Professor Martha Minow led an effort to draft and circulate a letter urging Congress not to pass it. The letter was signed by more than 500 law professors nationwide. In it, Minow and her colleagues wrote: "The bill would rob individuals detained by the United States of the hallmark of American freedom, the right of anyone detained by the government to demand to know why and to challenge the conditions of confinement before a federal court." They also assailed the act for "abandon[ing] our long-standing constitutional protections against punishing people on the basis of coerced testimony and against denying individuals the opportunity to defend themselves through access to exculpatory evidence known to the government," writing, "These provisions reward and encourage torture, and undermine the fairness of the resulting trials."

Sen. Patrick Leahy, a Vermont Democrat and an opponent of the bill, cited the letter in a Senate floor debate.

"It obviously didn't change the outcome," says Minow, who has written an array of recent scholarly pieces covering coercive interrogation, warrantless electronic surveillance, data mining, the Patriot Act, targeted assassinations, racial and ethnic profiling, and holding soldiers accountable for abusive conduct. "But it did help lay the groundwork for substantive arguments and help create a network of people involved in court challenges to the act."

#### PRESIDENTIAL SIGNING STATEMENTS

The same January week that David Barron testified in the Senate, Professor Charles Ogletree Jr. '78 testified in front of the House Judiciary Committee, on presidential signing statements. Presidents have issued such statements when signing bills they don't like but can't successfully veto, sometimes indicating that they will construe ambiguities in the statutes in ways that may run counter to what Congress intended. Ogletree and other critics have assailed the growing use of these statements as a kind of executive lawmaking in defiance of congressional power. "First, it makes the idea of a veto, the normal legislative process, null and void, when a president does not really bring to Congress' attention specific substantial objections to laws that are approved by Congress," Ogletree told the committee. "Number two: Right now, no member of this Congress has any idea where, when and to what extent the president modifies a law that you've passed."

At the time of Ogletree's testimony, legislators were mulling the possibility of a court challenge to signing statements. But Tribe suggested that a lawsuit would miss the mark. "It's not the statements that are the true source of constitutional difficulty," he wrote in *The Boston Globe*. A legal challenge is not a plausible way of contesting a president's "manifestly unreviewable decision to sign rather than veto any particular law, however cynical that decision might be and however unconvincing his explanations are," he wrote.

Far more fruitful, Tribe suggested, would be for Congress to use its constitutional power under the Necessary and Proper Clause of Article I to monitor officials and to make sure they are implementing statutes the way Congress intended.

Judiciary Committee members quizzed Ogletree about why he thought presidential signing statements were objectionable as a matter of law whereas Tribe didn't. "Professor Tribe ... has drawn a distinction between what he saw going on with prior presidents and his concern about the exercise of authority by President Bush," Ogletree replied, drawing a distinction of his own. "[He] thinks that these are serious transgressions, even though the idea of signing statements, as a matter of law, he does not find objectionable."

In that brief exchange, the important contributions of constitutional scholars—and the sometimes subtle differences of opinion between them—were on display. "It's fair to say," says David Barron, "that Con Law professors have been getting more proactive." \*

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*Seth Stern '01 contributed reporting for this article.*

# The Constitution's OMBUDSMAN

LETTING THE CHIPS  
FALL where they  
may, Glenn Fine '85  
prepares to testify on  
Capitol Hill.

## Keeping Justice honest, from the inside

FEW AMONG US ARE paid to tell the boss that he has screwed up. Still fewer get to do it with the whole world watching, in a politically charged atmosphere, when what's at stake is the rule of law, and even, sometimes, the Constitution.

As the Department of Justice's inspector general, Glenn A. Fine '85 does just that.

While Congress and the White House spar over allegations of executive overreaching and unauthorized action by the Justice Department, Fine's job is to monitor how well the nation's top law enforcement agencies—and his own superiors at Main Justice—comply with the law.

BY KRISTIN  
ELLASBERG

He did so with his 2003 investigation of and report on the treatment of detainees at Guantánamo Bay. His testimony before the Senate Judiciary Committee elicited praise from both Republican Orrin Hatch and Democrat Russ Feingold '79, and the executive director of the American Civil Liberties Union singled him out in *The New York Times* for skillfully surmounting the Justice Department's resistance to giving up the information required for his investigation.

In March, Fine's report on the FBI's misuse of national security letters under the Patriot Act detailed the bureau's collection of information on American citizens who had no clear ties to terrorism and its failure to keep accurate records of the letters and the data they produced. Other reports he has issued detail the Justice Department's indiscriminate roundup of Arab and Muslim immigrants after the Sept. 11 attacks, the FBI's failure to locate two hijackers before the attacks, and the backlog of untranslated tapes and documents from counterterrorism investigations.

More recently, he has agreed to assess his department's involvement with the National Security Agency's warrantless surveillance program. In a Nov. 6, 2006, letter to Rep. Maurice Hinchey of the House Appropriations Committee, he wrote: "We have decided to open a program review that will examine the Department's controls and use of information related to the program and the Department's compliance with legal requirements governing the program."

Fine is also playing a role in the department's inquiry into the firing of eight U.S. attorneys, amidst allegations that the dismissals were politically motivated and engineered by the White House.

There has been an inspector general monitoring the actions of the Justice Department and its various law-enforcement agencies since 1989. But, says Fine, Sept. 11 probably made the position more prominent:



“The Patriot Act gave a function to the IG of receiving and reviewing complaints of civil liberties abuses. With the added powers given to the department, there’s been an increase in the responsibilities given the Office of the Inspector General, and we have tried to fulfill those responsibilities as aggressively and fairly as we can.”

“We strive to be independent,” Fine says. “We also strive to earn the reputation of being tough but fair.” Of his national security letter report, he says, “I’m proud of it because we identified problems in the use of those letters, but we also pointed out how they can be used effectively and suggested corrective action for improvement.”

Fine emphasizes that his job doesn’t end with such recommendations. Following up on a 2002 report revealing that the FBI had lost weapons and laptop computers seized in terror-related sweeps, he and his staff recently checked to see if the bureau had fixed its problems. “We found continuing instances where they had lost laptop computers—and had not even determined what was on them, whether there was sensitive or classified information,” he says. “So, while they said they would take corrective

action, and they had taken some, they had not fully implemented our recommendations.”

Fine graduated in 1979 from Harvard College, where he was co-captain of the varsity basketball team despite being just 5 feet 9 inches tall, and was known as tenacious, setting college records for assists. He was drafted by the San Antonio Spurs of the National Basketball Association, but instead of heading in that direction, he went to Oxford as a Rhodes scholar, and then to HLS.

He has worked for the OIG since January 1995. Initially, he was special counsel to the inspector general, and in 1996, he became director of its special investigations and review unit. In 2000 he moved up to the top job. Before joining the OIG, Fine practiced labor and employment law at a firm in Washington, D.C., and prior to that, from 1986 to 1989, he served as an assistant U.S. attorney in Washington, D.C., taking more than 35 criminal cases to trial in front of juries.

By all appearances, he enjoys his current post, although he acknowledges that it is not without its stresses. In March, he told a House committee: “Before I started this job as the IG, I was 6-9.” \*



# Lawyers, GUNS AND MONEY

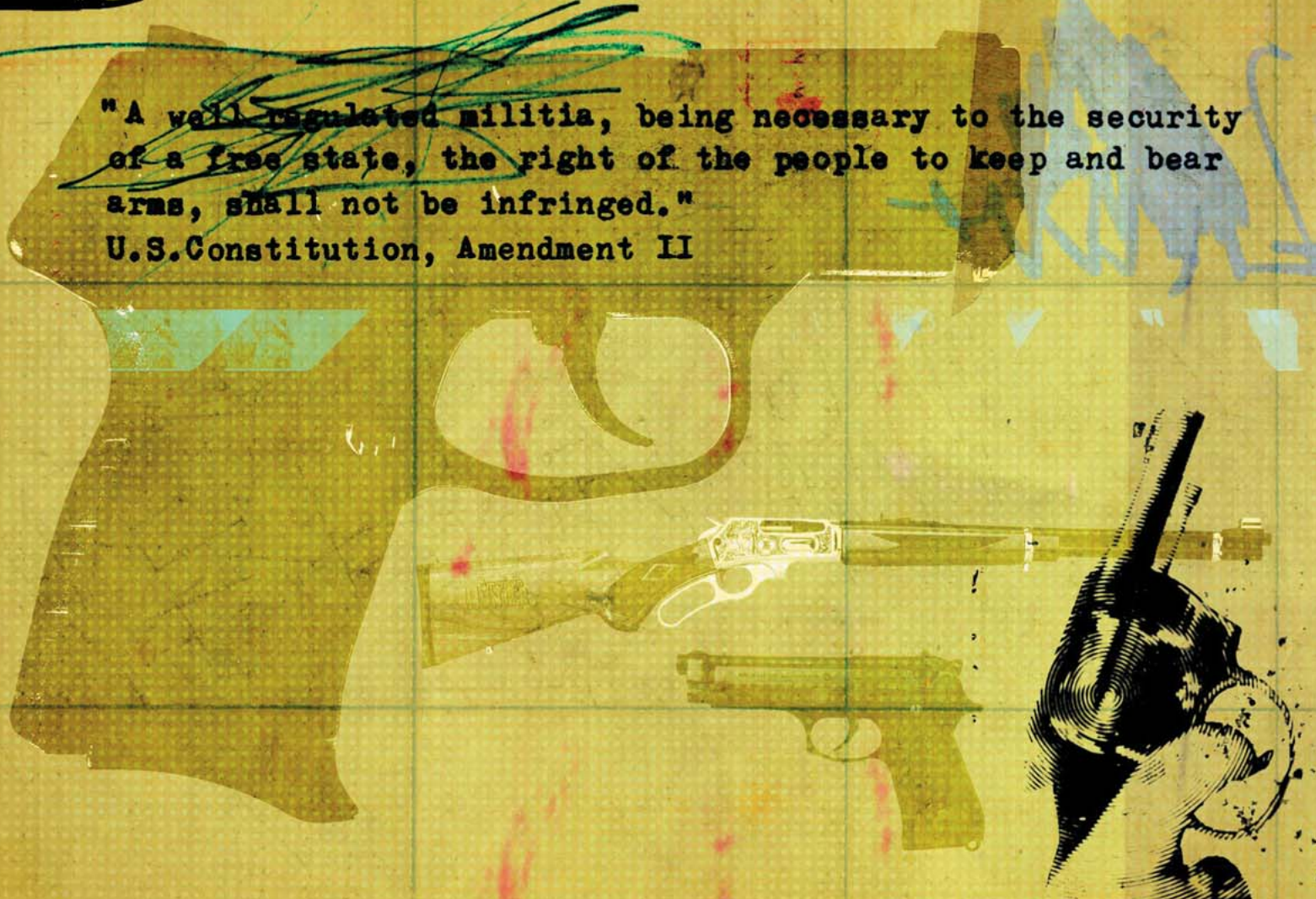
*This time,  
the Supreme  
Court may  
have to  
decide what  
the Second  
Amendment  
means. But  
how much  
will really  
change?*

*BY  
ELAINE  
McARDLE*





"A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."  
U.S. Constitution, Amendment II



*“A well regulated militia,  
being necessary to the security  
of a free state, the right of the  
people to keep and bear arms,  
shall not be infringed.”*

U.S. CONSTITUTION, AMENDMENT II

**EARLIER THIS YEAR**, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit struck down the District of Columbia’s stringent gun-control regulations, ruling squarely that the Second Amendment protects an individual’s right to bear arms.

In the cultural and legal battle over gun control, the decision was the proverbial shot heard ‘round the world.

The ruling—in *Parker v. District of Columbia*—marked the first time a gun law has been found unconstitutional based on the Second Amendment, and it set up a direct conflict among the circuits. Nine federal appeals courts around the nation have adopted the view that the amendment guarantees only the collective right of organized state militias to bear arms, not an individual’s right. (A 5th Circuit panel found that individuals have gun rights but upheld the regulation in question, so both sides claim that ruling as a victory.)

In May, when the full D.C. Circuit Court refused to grant a rehearing en banc, the stage seemed set for a showdown in the Supreme Court, which has thus far managed to dodge the question of whether the Second Amendment guarantees an individual’s right to bear arms.

According to HLS Professor Mark Tushnet, author of *“Out of Range: Why the Constitution Can’t End the Battle Over Guns”* (Oxford University Press, 2007), earlier petitions were cluttered by issues that allowed the Court to decline review or avoid the Second Amendment question. But *Parker* “is more straightforward,” Tushnet says, and the Court will have a tougher time avoiding the issue.

If *Parker* is the long-awaited “clean” case, one reason may be that proponents of the individual-rights view of the Second Amendment—including the National Rifle Association, which filed an amicus brief in the case—have

learned from earlier defeats, and crafted strategies to maximize the chances of Supreme Court review. For one thing, it is a civil case, not a criminal one, and the six plaintiffs, in the words of NRA President Sandra Froman ’74, are “ordinary people whose lives are impacted by not having the right to protect themselves.” They include a woman who lives in a high-crime area and has been threatened by drug dealers, a gay man assaulted because of his sexual orientation and a special police officer for the Federal Judicial Center.

In addition, the laws challenged in *Parker* are among the most stringent in the nation: Handguns cannot be registered in the district; those registered before a 1976 ban cannot be carried from one room to another without a license; and any firearm in a home must be kept unloaded and either locked or disassembled.

Also important, says Tushnet, is the fact that because *Parker* emanates from the District of Columbia, where only federal law applies, it doesn’t involve the overlaying question of whether the Second Amendment applies to a state by way of the 14th Amendment—a question that clouded an earlier case involving one city’s complete ban on handgun possession. He adds that a number of states urged the Court not to take that case, and the solicitor general did the same in another one.

Pro-gun activists like Froman are confident that the Court will hear an appeal by the district in *Parker*, and they say that they couldn’t have gotten this far without help from an unlikely quarter: liberal law professors. In the past 20 years, several prominent legal scholars known for liberal views, including Professor Laurence Tribe ’66, have come to believe that the Second Amendment supports the individual-rights view. In the 2000 edition of his treatise *“American Constitutional Law,”* Tribe broke from the 1978 and 1988 editions by endorsing that view. Other liberal professors, including Akhil Reed Amar at Yale Law School and Sanford Levinson at the University of Texas at Austin, agree.

“My conclusion came as something

of a surprise to me, and an unwelcome surprise,” Tribe said in a recent New York Times interview. “I have always supported as a matter of policy very comprehensive gun control.”

Froman says the fact that Tribe and others reversed their interpretation in recent years has had enormous influence. Indeed, the majority opinion in *Parker*, written by Judge Laurence H. Silberman ’61, referred specifically to Tribe’s revised conclusion.

The 27 words of the Second Amendment may be the most hotly contested in the Constitution. Gun-control advocates and opponents read its tortured syntax entirely differently. Each side resorts to what Tushnet calls “a simplified version of constitutional analysis” to support its viewpoint, looking solely at the wording of the amendment and what the language meant in 1791 rather than at whether society has changed in the meantime and what judicial precedents offer guidance. In “virtually no other area in constitutional law” is analysis done that way, he says, although he’s not sure why.

“There’s very little guidance on what the actual meaning of the Second Amendment is,” says Froman, a Tucson lawyer who was interviewed by the *Bulletin* when she returned to HLS in early April to speak on a panel. “The courts have talked a lot about the Second Amendment but have always been nibbling around the periphery. There’s never really been ‘Let’s explain and elaborate on what it means.’”

For Anthony A. Williams ’87, who served as mayor of the District of Columbia from 1999 until earlier this year and vigorously enforced the district’s gun laws during his tenure, the meaning of the amendment is unambiguous, no matter what interpretive theory is used. “Let’s take [Justice Antonin] Scalia’s approach,” he says. “I think the framers’ intent was to see to it that [through] militias, states as sovereign entities had a right to arm themselves. To me, it’s not about individuals—it’s about groups.”

But Froman firmly reaches the opposite conclusion: “A lot of people say that the prefatory clause of the Sec-

**Armed with the Facts** *Some say the Constitution supports an individual's right to bear arms. Others say it supports only a collective right. In an excerpt from his new book, Mark Tushnet says: It's a draw.*

"What's the bottom line? On balance, originalism supports some version of an individual-rights interpretation, although the case for such an interpretation is closer than proponents of the gun-rights position acknowledge, and the states' rights interpretation preferred by gun-control advocates isn't entirely ruled out by originalist interpretation. Approaching the question of interpreting the Second Amendment as judges do—that is, by treating original meaning as important but taking other matters, such as precedent, into account—changes the bottom line. Gun-control proponents have a significantly stronger case than their adversaries if we treat the question of interpreting the Second Amendment as an ordinary constitutional question and use all the interpretive tools judges ordinarily use."

Mark Tushnet, "Out of Range: Why the Constitution Can't End the Battle Over Guns" ©2007 Oxford University Press



ond Amendment—the words 'A well regulated militia ...'—limits the active clause pertaining to bearing arms. They want to say that means you can only exercise the right to keep and bear arms as part of a militia, meaning as part of the National Guard, forgetting that the National Guard didn't exist then."

"Remember," Froman adds, "the Second Amendment guarantees a right—it does not confer a right. It's God-given. It's natural. The right of self-survival is a basic instinct of any organism." The Constitution "acknowledges that."

Tushnet believes that if the Court grants certiorari, it will ultimately overturn the decision of the D.C. panel. "My gut feeling is that there are not five votes to say the individual-rights position is correct," he says. "[Justice Anthony] Kennedy comes from a segment of the Republican Party that is not rabidly pro-gun rights and indeed probably is sympathetic to hunters but not terribly sympathetic to handgun owners. Then the standard liberals will probably say 'collective rights.'"

But Tribe is less confident of that prediction. Should the case reach the Supreme Court, he told *The New York Times*, "there's a really quite decent chance that it will be affirmed."

If that happens, Tushnet says, it is unlikely to end all gun regulation, because the Court would probably tailor its decision narrowly to reach consen-

sus. The three-judge panel in *Parker* struck down only D.C.'s tight laws. "Once you recognize [gun ownership] as an individual right, then the work shifts to figuring out what type of regulation is permissible," he says.

Tushnet says the gun-control debate is an intractable one in which neither side will move, and a constitutional "answer" from the Supreme Court will be something of a nonstarter. Like the arguments over abortion and stem-cell research, he says, the argument over guns is in truth another battle in the culture wars and cannot be solved by constitutional analysis because neither side can be persuaded.

No gun-control strategy with any chance of surviving the political process would have a significant effect on overall gun violence or crime, Tushnet believes. To say so publicly would be the boldest and most honest stand that a major politician or candidate could take, he adds.

The tragic shootings on the campus of Virginia Tech seem to have changed no one's position: "People responded to it in exactly the way you would expect," Tushnet says. Supporters of gun control sought stricter laws and better enforcement, and the NRA advocated that teachers and others be armed to protect themselves.

Activists on both sides bear out that observation. Williams believes that the district's gun laws were lowering the human and financial costs of

gun-related violence. "When I started as mayor, we had well over 200 homicides a year," he says. "We brought that down to below 160, so we made serious inroads in reducing violent crime; but still, in many neighborhoods, the situation is horrific."

Says Froman: "Statistically, the parts of the country with the greatest number of firearms have the lowest rates of violent crime with guns. It's easy to understand why. Let's say there were 30 people in this room, and this was a state that allowed people to carry concealed weapons for self-defense, and a criminal walked in. At least half the people in the room would draw down on the criminal. That would be the end of it."

Froman had nothing to do with guns until, some 25 years ago, someone tried to break into her Los Angeles home. "I was terrified," she says. "It was a real epiphany for me, for someone who had never been a victim of crime, who never thought I needed to protect myself." The next day, she walked into a gun shop to purchase a weapon. She has been a staunch gun advocate ever since.

Does Froman ever worry about repercussions, given that she's at the center of such a heated issue? "I live in a very rural area, at the end of a long driveway," she says. "People ask me, 'Don't you get scared?' I say, 'Are you kidding? I have a clear shot all the way to the road.'" \*

# ELEVATION

*In Bhutan, a constitution is in the offing. Will it raise the “gross national happiness”?*

BY EMILY NEWBURGER

As HRH Princess Sonam Wangchuck LL.M. '07 studied comparative constitutional law in Pound Hall this spring, her native Bhutan was in the midst of its own course in constitutional democracy.

Her father, King Jigme Singye Wangchuck, had been modernizing the tiny Himalayan kingdom most of Sonam's life, gradually decreasing the power of an absolute monarchy. By 2005, at his behest, a constitution was drafted, outlining the workings of a two-party constitutional monarchy in which the king is head of state—but not of the government—and parliament has the

**A DRAGON BETWEEN GIANTS**  
*Atop its Himalayan perch, Bhutan is surrounded by powerful neighbors.*



A PRINCESS WITH  
A DEMOCRATIC  
CONSTITUTION  
*Sonam Wangchuck*





**PRACTICING FOR  
DEMOCRACY**  
*Citizens line up for  
mock elections.*

power to oust him with a two-thirds majority.

Bhutan is the last country in the region without a politically elected government—a latecomer to what Professor Mark Tushnet calls “a worldwide movement in the direction of adopting democratic constitutions.” But according to Tushnet, rather than leading these transformations, elites in power are usually the obstacle.

“My father always said that you can’t leave the future of the country in the hands of one person,” Sonam recalls. But, she says, he believed that “people need to be educated to a certain level before they can embrace democracy.”

As he gradually modernized the Buddhist country—achieving gains in literacy and a decline in child mortality—Sonam’s father invented his own measure for gauging progress. Instead of gross national product, he decided “gross national happiness” should be the yardstick, involving harmony with nature, good government, equity and connection to cultural heritage.

Beginning in 2001, a 39-member committee—including the chief justice, the speaker of the National Assembly and members of local government—looked at more than 100 constitutions. The committee was particularly influenced by South Africa’s, Sonam says, because of its strong protection of human rights. But the final product also reflects Bhutan’s religion and the king’s philosophy.

Although the constitution recognizes Buddhism as “the spiritual heritage of Bhutan,” freedom of religion is among the fundamental rights. Others include a presumption of innocence, freedom of expression and equal pay for equal work. But the document also refers to fundamental duties, such as the obligation to help the victims of accidents.

And, harking back to Bon, the nature-focused religion that preceded Buddhism and is still practiced today in some rural areas, says Sonam, the constitution charges the citizens and the state

with preserving the environment, stipulating that more than 60 percent of the country remain covered by forest for all time.

Preservation of Bhutan's culture and heritage is also a duty. That, according to Sonam, "has a lot to do with [maintaining] sovereignty." Known to its people as the land of the thunder dragon, Bhutan is a little larger than Switzerland, but its population is estimated at just over 700,000. "We're in between two giants, China to the north, and India is surrounding us east, west and south. And we have always been an independent country," she says. "Promoting our culture is extremely important ... so that we don't just blend in with our neighbors."

But many of the rights enumerated in the constitution are restricted to citizens, and the bar for achieving that status is high. Because Bhutan is a small country that provides free health care and education to its people, it must be "a little more stringent," Sonam says. "Problems with immigrants in the early '90s" may have inspired those restrictions, she adds. During that period, ethnic Nepalis fled Bhutan, or were expelled, after a crackdown on political ferment, and more than 100,000 are stranded in refugee camps in Nepal.

After drafts of the constitution were distributed across Bhutan, Sonam and her father traveled the country to meet with citizens. "There were lots of concerns," she says. People didn't like the fact that the king must retire at 65, for example. "And there were just apprehensions. I think they were a little nervous—especially rural Bhutan—about having people in the city forming political parties." (Up until now, the state has not allowed the formation of political parties.)

This spring, the people's education continued as the government sponsored mock elections and citizens lined up to practice voting.

While Sonam was finishing her first semester at HLS, her father abdicated the throne in favor of her eldest brother. She speculates that he stepped down before the constitution was ratified so that there could be a period of transition and not all the changes would occur during his rule. At 26, King Jigme Khesar Namgyel Wangchuck is the world's youngest head of state. But, says Sonam, "Our father became king when he was 16, so my brother's quite old." She laughs. "He's had enough time to prepare."

Polygamy is legal in Bhutan, and Sonam and the new king have eight other siblings, whose mothers are sisters. As children, she and the others played at governing the kingdom. It was a game, she recalls, but they were seriously in-

spired by their father "and we each wanted to do something to help the country." Sonam chose law. After getting a B.A. in international relations from Stanford, she clerked for the High Court of Bhutan before coming to HLS.

The constitution is slated to be ratified in 2008; after that, parliamentary elections will take place and the country's Supreme Court, with final authority over matters related to the constitution, will be established. Sonam came to HLS to study constitutional law. She returns with hopes of strengthening Bhutan's judiciary and its developing legal system. She is bolstered by her field of study, in which few lawyers in the kingdom have training. She also values the friendships she formed at HLS and the new knowledge she gained "about the situations and different experiences of so many lawyers from different countries." In her own country, she is particularly concerned with rural areas, where people could easily be left behind in the wake of modernization.

As for the larger issue of Bhutan's fate under the new system: "We're optimistic, but at the same time a little nervous because of the direction that democracy is taking in our neighboring South Asia—with corruption," she says. In 2006, to prepare for the transition, the government passed a bill setting up the framework for investigating and prosecuting corruption. "Lots of challenges can come up. So you have to hope for the best, but, as my father always says, 'You have to plan into the future! You have to plan. Never just do anything on a whim.'" \*

Bhutan's  
draft  
constitution  
stipulates  
that more  
than 60  
percent  
of the  
country  
remain  
*COVERED  
BY FOREST*  
for all  
time.

# VOXX POPULLI

For students in Harvard Law School's Supreme Court litigation clinic, helping Laurence Tribe prepare for an argument is like being in the eye of a storm—if they can get through the storm itself. *BY ROBB LONDON '86*  
*PHOTOGRAPHS BY CHRIS HARTLOVE*

**BRAINSTORM**  
*Reviewing final  
assignments with  
less than two  
days to go*







**FRIDAY** evening, less than three days before he is to argue his 35th case in the highest court in the land, Laurence Tribe '66 is working quietly in a suite at the Watergate, as a major blizzard paralyzes much of the Atlantic seaboard.

A handful of Harvard Law School students who have been assisting him are stranded at Logan Airport in Boston. It's not clear that they will even make it down before Monday's argument, let alone help him with the myriad last-minute tasks that he has for them.

Still, there is e-mail, and Tribe sends assignments and requests to the 23 people—associated counsel, assistants and students—who make up his team. He also sends messages to his client, Frank Robbins, a Wyoming rancher whose case has brought him to the United States Supreme Court—"the last place on God's green earth I ever imagined I would be," Robbins says later.

In 1994, Robbins bought the High Island Ranch in Hot Springs County, Wyo., intending to run it as a guest ranch and to raise his 8,000 head of cattle there. What he got with the deed turned out to be a 13-year standoff with federal officials over access to his land—and litigation that has nearly ruined him. It was the beginning of a Western saga that could succinctly explain the sentiments behind the phrase "sagebrush rebellion."

A month before Robbins bought the ranch, the prior owner granted the Bureau of Land Management an easement so that bureau officers could gain access to adjacent federal lands. The situation was not uncommon in that part of the West, where federal, state and private parcels are interlocked in a symbiotic crazy quilt of easements and grazing rights.

But in a snafu of the kind one might find in the fact pattern of a bar exam question, the BLM failed to record the easement. When Robbins bought the property—with no knowledge of the easement—he was able to record his title in Hot Springs County free of that encumbrance.

After BLM officials realized their mistake, they contacted Robbins to discuss a new easement. According to court documents, they didn't just ask for one—they demanded it. Robbins, who says he had been willing to negotiate a deal, refused, citing the Fifth Amendment to the Constitution, which provides that "private property [shall not] be taken for public use, without just compensation."

BLM officials then embarked on what Robbins says was a long-term campaign of intimidation and retaliation. They stopped maintaining a road leading to his property, canceled his right-of-way across



federal land between the ranch and a public road, revoked his grazing permits, interfered with his cattle drives and guests, and, in one instance, threatened to "bury him." There was also evidence that they broke into a lodge on his property.

When his cattle strayed onto federal lands, BLM officers wrote him up for trespassing, ignoring similar breaches by other ranchers. They also persuaded the local U.S. attorney to charge him with the felony of interfering with federal officers—and then offered to make the charge disappear in exchange for granting the easement. He refused.

At the criminal trial on the interference charge, the jury took less than half an hour to acquit Robbins. But in addition to suffering through the ordeal of a trial, he had racked up huge legal bills, some of them arising from all the little citations that had been issued over four years.

In 1998 Robbins decided to sue the BLM officers who had been pressuring him.

Ordinarily, people challenging the actions of federal agencies sue under the Administrative Procedure Act and several similar statutes governing administrative action—the avenues that courts usually insist plaintiffs take when seeking relief from agency rulings or directives. But Robbins was not disputing formal agency decisions so much as seeking accountability for a pattern of allegedly lawless conduct by particular agents.

Instead of suing the bureau under the APA, Robbins filed suit in federal court against six employees of the BLM in their individual capacities for violations of

**QUIET TIME**

*Tribe (left) goes back to the cases, while Robbins (above right) talks to students in the suite.*



#### FLINT AND MARBLE

*Supporters of Robbins' have come from Wyoming for the argument; (right) A BLM map of the High Island Ranch area*

what he claimed was his clearly established Fifth Amendment right to exclude the government from his property and to be free from coercive attempts to obtain that property

through methods other than a lawful exercise of the government's power of eminent domain.

He brought that claim under the authority of *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics* and the line of cases holding that federal officers who intentionally violate a "clearly established" constitutional right can be sued personally for damages, and cannot hide behind a claim of official immunity.

Aided by Cheyenne attorneys Karen Budd-Falen and Marc Stimpert, Robbins also alleged that the BLM officials had engaged in a pattern of extortion and blackmail in violation of the civil provisions of the Racketeer Influenced and Corrupt Organizations Act. Although officials have been sued under the civil provisions of RICO—or prosecuted under its criminal provisions—for extorting a personal benefit, Robbins' RICO claim was unusual because it sought relief for action by officials who had tried to obtain a benefit not for themselves but for the government.

Today, nearly 10 years since Robbins filed suit, the case has still not gone to trial. Instead, it has bounced several times from federal district court to the 10th Circuit Court of Appeals and back, in litigation over the government's motions to dismiss or for summary judgment—and now, in an interlocutory appeal, to the Supreme Court, on the government's petition for certiorari after the 10th Circuit cleared the way for a trial.

The Court granted cert in *Wilkie v. Robbins* to decide several questions, including one that gives it the opportunity to expand (or limit) the scope of the property rights that are encompassed by the Fifth Amendment—specifically, whether the amendment protects against retaliation for exercising a right to exclude the government from one's property when it is not engaged in a lawful taking. The 10th Circuit said yes—the first time a federal circuit court had explicitly ruled that such a right is protected.

If the Supreme Court recognizes such a right, it will also decide whether that right was "clearly established" in this case, for purposes of evaluating Robbins' claim that the BLM officers knew or should have known they were violating it.

The Court also agreed to hear whether Robbins' *Bivens* action is precluded by the availability of judicial review under the Administrative Procedure Act or other statutes for pursuing grievances against administrative action.

Finally, the Court certified the question whether government officials acting pursuant to their regula-



tory authority can be found liable under RICO for the predicate act of "extortion under color of official right" for attempting to obtain property for the sole benefit of the government, and if so, whether in this particular case that statutory prohibition was clearly established when they allegedly did so.

Tribe entered the case at the invitation of Robbins after the government filed its cert petition. For Tribe, it was a chance to involve students from Harvard Law School's Supreme Court litigation clinic, which brings advocates to campus to moot their cases before arguments in the Court and provides students with opportunities to work on cert petitions and other briefs.

"I believed that the government's position was both wrong and dangerous and the rancher-respondent's position was correct and ought if possible to be vindicated," says Tribe. "The case seemed challenging, interesting and pedagogically valuable for the students in the Harvard Supreme Court litigation clinic ... so I offered to brief and argue it pro bono."

**SATURDAY** morning comes, and there has been no letup in the storm. Overnight, however, Tribe has received an e-mail from two of his students, Anna Holloway LL.M '07 and Daniel Gonen '07, with some last-minute research, accomplished while they were grounded at Logan.

Despite the fact that his brief to the Court was filed weeks earlier, Tribe has continued to look for language from opinions that might lend additional support to his arguments. While waiting out the storm, Holloway and Gonen have found some encouraging parallels in several older cases to support the idea that the government cannot coerce a citizen into relinquishing a constitutionally protected right (a property right, no less, in a case dating back to 1926, *Frost v. Railroad Commission*).



Tribe sends them a reply. “Dan and Anna,” he writes, “The memo you attached is extremely useful, both in helping me to catalogue the cases and in furnishing some potentially helpful language for the sound-bite-sized observations to which a half-hour argument often requires resort.”

That last point is a reminder to himself as much as a thank-you to the students. Tribe tends to write and speak in long, wedding-cake paragraphs of cascading tiers, but on Monday he will have to keep things shorter and punchier, especially given the tendency of the justices to interrupt.

A few minutes before 6:00 a.m., he sends an e-mail to the rest of the team about the language in Frost. “I have good news,” he writes. “It’s a Supreme Court precedent, one I’ve written about in my treatise and mentioned a couple of times in our very first meeting in Cambridge but assumed that everybody had checked out and found wanting and thus never mentioned again. Well, thanks to the work that Dan and Anna did while stranded yesterday at Logan, the precedent has resurfaced. It’s a case in which the Supreme Court extracted from earlier decisions the broad principle that government may not ‘compel the surrender’ of ANY constitutional right ‘as a condition of its favor.’”

He continues: “I’d appreciate someone ... letting me know some of the more notable cases that cite Frost approvingly, including any opinions by Scalia, Thomas, etc. ... Does the Roberts opinion in the Solomon Amendment case do so?”

When asked if he is tailoring certain arguments to fit the known predilections of particular members of the Court, Tribe politely declines to answer in specific terms, citing “considerations of privilege and protocol.”

But more generally, he says: “Part of my preparation in any Supreme Court case involves reviewing the jurisprudence of each justice on the issues directly involved and on surrounding issues, and I try to craft an argument that can appeal to as wide a range of justices as possible, always taking care to stay within parameters determined by my sense of what can fairly be argued from the relevant texts and precedents. Sometimes I find it necessary to argue in the alternative, directing some arguments to part of the Court and others to another part of the Court, while being careful not to make arguments that directly or indirectly undercut or contradict one another.”

A meeting of the team has been called for 2:30 in Tribe’s suite. It will be the last one before Monday’s argument. Gonen and Holloway finally managed to get on a flight and have arrived. Kevin Russell, of the D.C. firm Howe & Russell, comes from his downtown office.

Budd-Falen and Stimpert are in town from Cheyenne and arrive with Frank Robbins and his wife, who wear matching jackets embroidered with the logo of the

High Island Ranch. Robbins—easily six feet two inches in his boots and even taller in his Stetson—chews on a toothpick and banters with the others.

Tribe requests some last-minute research. He is focused on the government’s argument that the Fifth Amendment constrains only how the government itself may regulate, not the actions of individual officials.

“I’d like to show that at least some of our cases about unconstitutional conditions or impermissible retaliation in fact involved actions by individual, perhaps even renegade, officials rather than actions by agencies or municipalities or counties or states or the federal government,” he says. “I’d appreciate having somebody dig ASAP to locate cases in which the anti-retaliation principle is enforced against individual government officials.”

The meeting breaks up after about an hour, and the students leave to chase down additional case law. Tribe goes back to studying at the Watergate, much the way he did in 2000, in the same hotel, when he prepared to argue *Bush v. Gore*. He spends the next day looking over cases and the student memos that come in by e-mail. Adding considerably to his stress, his voice has been failing, so he keeps a humidifier running.

**MONDAY** morning comes, and the storm has lifted. The white marble facades of the Supreme Court are dazzling. Inside, Frank Robbins is accompanied by a posse of supporters from Wyoming—most of them wearing Stetsons. Tribe, Russell and Budd-Falen sit at the table for the respondent’s counsel. The government is represented by Gregory Garre, a deputy solicitor general.

Garre goes first. From the outset, the justices’ questions indicate that they are primarily concerned with whether a Bivens action is an appropriate remedy for a violation of the Fifth Amendment right against retaliation claimed by Robbins. Garre implores the Court not to recognize “a new constitutional tort” that would extend Bivens “to an entirely new context” and “threaten public resources and public lands.”

Along with Justices Anthony Kennedy ’61 and Antonin Scalia ’60, Justice Ruth Bader Ginsburg ’56-’58 pushes to hear whether there were other channels—such as an injunction or an internal investigation—through which Robbins could have won relief from the officers’ pattern of misconduct. The justices sound skeptical that a Bivens action is the answer, but they sound equally unpersuaded that he could have pursued other avenues every time he was harassed. They raise the metaphor of death by a thousand cuts, aware that each separate filing of a grievance or complaint would have cost him more time and money.

**COMING DOWN**  
*The argument over, Tribe emerges from the Court.*

Scalia shifts the focus, trying to clarify whether the BLM officers had simply been trying to negotiate new reciprocal easements after the ranch changed hands. Garre's answer leaves the impression that they were.

Garre segues into the question of whether the BLM officers are immune from personal liability. They have immunity, he argues, because they were carrying out their official duties and could not possibly have known they were committing a constitutional tort.

Scalia interrupts: "Busting into his lodge? ... They thought that was probably allowed?" Garre acknowledges that they might have known they were committing some kind of violation, but they couldn't possibly have been on notice that they were committing a con-

stitutional violation that has never been recognized.

When Tribe stands at the lectern to face the Court, his voice, though a bit gravelly, is strong enough to be heard. He begins with the immunity issue, saying that one needn't have taken a special course in constitutional law to know that the deliberate decisions made over nearly 12 years to retaliate against Robbins were clearly forbidden.

Scalia dives in, still not clear about whether the BLM officers had merely been seeking to negotiate new reciprocal easements. If that was the case, he says, he's inclined to tolerate some of their hardball tactics. (Chief Justice John G. Roberts Jr. '79 suggests the same thing a bit later.) No, says Tribe, Robbins bought the ranch

## "Oyez! Oyez!—Oy Vey ..."

*In the Supreme Court, Harvard Law professors take liberty seriously. Sometimes, they seriously take liberties.*

Laurence Tribe isn't the only Harvard Law School professor who has pressed a case in the Supreme Court recently.

Professor Carol Steiker '86 helped persuade the Court to overturn a trio of Texas death sentences in April, convincing the justices that jurors weren't given the opportunity to take mitigating evidence into account. Steiker served as co-counsel in one of the cases with her brother Jordan Steiker '88, who co-directs the Capital Punishment Clinic at the University of Texas at Austin School of Law with Robert Owen '89. Students in her courses helped write the brief.

At issue in two of the three 5-4 decisions was a 1996 law that limits federal court review of habeas corpus petitions filed by state prisoners, saying that a writ can be granted only if the state court decision at issue was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of



the United States." The Court held that the writs were in order since, by the time the Texas appeals court upheld the death sentences for the two convicted murderers, the Supreme Court had made clear in other cases from Texas that the state's jury instructions didn't sufficiently ensure that jurors had the opportunity to fully consider mitigating evidence.

In the third case, the issue was whether the Texas court had correctly followed a 2004 Supreme Court decision ordering reconsideration of the appellant's death sentence. The Court held that the Texas court incorrectly invoked a state procedural rule to authorize the execution.

"Seeing my research applied in the ultimate courtroom setting was very exciting," said Steiker, who is collaborating with her brother on a book about capital punishment. She is also working on a book about mercy and the criminal justice system, questioning "whether we ought to develop a more robust jurisprudence of declining to punish and try to infuse the huge grants of discretion we have with this value."

Professor Arthur Miller '58, who

completed his HLS teaching career this year, may have wanted to ask for mercy after pressing his case—and maybe his luck—on behalf of shareholders in a March argument in *Tellabs v. Makor*. In an exchange with Justice Antonin Scalia '60, Miller, suggesting Scalia was inclined to support the corporate defendants, quipped: "Is that because you never met a plaintiff you really liked?"

This elicited chuckles from Justices Stephen Breyer '64 and Clarence

Thomas, according to *The Associated Press*. Miller quickly added, "I took a liberty there with the justice."

Later, on a separate point, Miller told the Court: "Don't take me literally on that. For heaven's sake, I'm from Brooklyn. I'm very colloquial." Scalia jumped in. "Let me write that down," he said. "We should not take you literally. All right." After more laughter, Chief Justice John G. Roberts Jr. '79 ended it. "OK, you two are even now."



—Seth Stern '01



with a continuing right-of-way over government land for an access road, but the government didn't have one over his ranch. Robbins' right-of-way "ran with the land," he says. "It was part of what he bought."

That is, he adds, until the BLM canceled it. After that, Tribe notes, the officers continued to harass Robbins, trying to get him to "cough up" the easement. But instead of offering him one in return, they told him, "The United States does not negotiate."

Justice Stephen Breyer '64 is concerned that if the Court recognizes a Bivens cause of action in a property case, it will trigger a flood of federal lawsuits construing aggressive regulatory action as retaliatory. Tribe tries to allay the fear, citing cases in which the Court recognized a cause of action under Bivens for other violations by federal officers, and no flood of litigation ensued.

Justice Kennedy refers Tribe to a section of his brief and notes that some of the cited cases did not affirm the existence of a Bivens remedy for retaliation. But Tribe has never suggested that those cases support the existence of a Bivens remedy. He tries to set Kennedy straight, noting that he cited them for a different purpose—to refute the government's statement that, prior to the 10th Circuit's decision below, the right to be free from retaliation had been recognized only in cases involving punishment for exercising the right of free speech. Kennedy ends the discussion with "Let's leave that aside," but Tribe is clearly frustrated. The exchange has eaten up valuable time.

The chief justice comes back to the availability of other remedies: "Which of the government actions do you not have an existing remedy for?" Tribe answers, "It is the retaliatory pattern that there is no remedy for."

Justice Samuel Alito asks about the RICO claim and is concerned by the dearth of precedent on whether public servants can be guilty of extortion when they extort a benefit for the government rather than for themselves. When Tribe starts to discuss one case, Willett v. Devoy, Roberts asks, "Are the BLM folks supposed to have known about Willett v. Devoy as clearly establishing their liability for what you call extortion [but] what they would call trying to save the taxpayers money and getting the type of reciprocal agreement with this landowner that they have got with thousands of others?"

The question gets Tribe's dander up. "Well, Mr. Chief Justice, first of all, when you keep calling it a reciprocal agreement, it does trouble me," he says. "They weren't giving him anything. ... They were trying to get the easement for nothing. ... They were using the right-of-way, which was long gone, as an excuse to get an invaluable piece of property that they had no right to get. They were basically saying, and they made it explicit: Give us this easement for nothing or we'll bury you."



**AFTERWARD** on the plaza, Tribe stands in the bright sunlight with members of his team, but he is clearly distracted, perhaps replaying some of the argument. He never did point the Court to the language in Frost, not because there wasn't time, but because he decided there were aspects of the case that were problematic. Overall, his sense is that, although Scalia, Kennedy, Ginsburg and David Souter '66 seemed generally receptive to the argument that Robbins' rights under the Just Compensation Clause had been violated—and perhaps clearly enough to get past the immunity hurdle—there aren't five votes for the argument that what was done to Robbins was actionable in a Bivens suit.

He is also pessimistic about the RICO claim, because the justices sounded skeptical that the "predicate act" requirement can be met by an attempt to extort property for the government.

"All in all," he concludes in an e-mail to a colleague the next day, "this portends a pretty high likelihood of a disappointing (but not surprising) outcome, though not one I felt I could really have done much if anything (either in the briefing or orally) to avoid, which prevents the experience itself from having been too dismaying."

At least one other person awaits the Court's decision with as much interest as Tribe does: Frank Robbins, now back in Wyoming, tending a herd of cattle that has dwindled from 8,000 to just 800 because he no longer has access to enough grazing land. \*

**HIS DAY IN COURT**  
*Frank Robbins, after the argument, is still waiting for a trial, 10 years after filing his lawsuit.*

**ON JUNE 25**, as this issue of the Bulletin was going to press, the Supreme Court ruled 7-2 that Robbins could not proceed on his Bivens and RICO claims. The opinion, written by Justice Souter, can be found online at [www.supremecourtus.gov/opinions/06slipopinion.html](http://www.supremecourtus.gov/opinions/06slipopinion.html).

**NOTA BENE** *If Jake Gittes had been a lawyer, it might have gone more like this*

## A River Runs Through It

**WHEN TONY ROSSMANN '71**

started his own law practice in Sacramento, Calif., in 1976, he never expected he would help bring about one of the largest river restoration projects in the West. But today, more than 30 years after signing on to represent California's Inyo County against the city of Los Angeles, his career has produced a very tangible—and wet—result: All 62 miles of the Owens River are flowing again after being dry for nearly a century.

The river, a victim of the notorious L.A. water grab that began in 1898, had been depleted since 1913, after Los Angeles nefariously acquired most of the land in the surrounding valley and built an aqueduct that diverted its water to the city—events that inspired the film noir exploits of private eye Jake Gittes in the 1974 Oscar-winning movie “Chinatown.”

Inyo County brought suit in 1972 and Rossmann came on board in 1976. The litigation ebbed and flowed for years, until 1991, when the parties agreed on a plan to rewater the valley to repair environmental damage. It took another 15 years to prepare the dry riverbed to support an ecosystem.

“It started out as a modest idea to just put a little bit of water in the river once in a while, to create a little bit of habitat here and there,” Rossmann said. “What ultimately resulted was a really courageous decision on both sides ... to see if they could rewater the entire length of the river.”

But Rossmann is quick to emphasize that it was the litigation that forced Los Angeles to come to the table in the first place, a lesson he shares with students at UC Berkeley School of Law - Boalt Hall, where he teaches. “It’s been really satisfying to look at one’s practice and specialty in an academic setting in an effort that students will pick up the excitement and carry on,” he said.

—EMILY DUPRAZ



**TONY ROSSMANN**, above, and with his daughter Molly, below, on the newly flowing Owens River

Photograph (above) by JEN SISKA



## Who Said It?

**FRED SHAPIRO '80** says both science and art came into play in editing “The Yale Book of Quotations.” Associate librarian for Yale Law School, Shapiro relied on the latest research methods to bring together more than 12,000 entries in a volume which he believes rivals “Bartlett’s.” But selecting the most famous, elegant or culturally relevant quotes, he says, is also a question of “I know it when I see it.” Here’s what he saw when it came to selecting some of the most famous quotes by HLS alums. Can you name the speaker for each quote?

- 1 “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”
- 2 “It was a wise man who said that there is no greater inequality than the equal treatment of unequals.”
- 3 “And what is so rare as a day in June?”
- 4 “When you call me that, smile!”
- 5 “Your right to swing your arms ends just where the other man’s nose begins.”
- 6 “There are two kinds of lawyers—one who knows the law, the other who knows the judge.”
- 7 “Let’s talk sense to the American people.”
- 8 “Have you no sense of decency, sir, at long last? Have you left no sense of decency?”



### Answers

- 1. OLIVER WENDELL HOLMES JR. LL.B. 1866, *Schenck v. United States* (1919) 2. FELIX FRANKFURTER LL.B. 1906, *Dennis v. United States* (dissenting opinion) (1950)
- 3. JAMES RUSSELL LOWELL LL.B. 1840, “The Vision of Sir Launfal” (1848) 4. OWEN WISTER LL.B. 1888, “The Virginian” (1902) 5. ZECHARIAH CHAFEE JR. LL.B. 1913, *Harvard Law Review* (June 1919) 6. JOSEPH H. CHOATE LL.B. 1902, quoted in *Arthur Tappan’s* (LL.B. 1899), “Mr. Tappan Comes Home” (1941) 7. ADLAI E. STEVENSON 1922-1924, *speech accepting presidential nomination* (July 26, 1952) 8. JOSEPH N. WELCH LL.B. 1917, *remark to Sen. Joseph McCarthy* (June 9, 1954)

## Sifting for Gems in a Quarry of Sound Bites

**WE’RE NOT AS ELOQUENT** as we used to be, says Fred Shapiro ’80. Here, we give him the chance to say something quotable:

*Your quiz doesn’t contain any quotes from contemporary grads. Why?* The New York Times story on my book invited readers to send in contemporary quotes, because I had fewer of them. I’d invite your readers to do the same [fred.shapiro@yale.edu]. It does take a while for quotations to enter the language and become really famous. But

people have become less eloquent nowadays. No one comes up with quotes on the level of Oliver Wendell Holmes or Henry James. **Because of your dual allegiance, this may be an awkward question to answer. But does “The Yale Book of Quotations” contain more quotes from grads of Yale Law School or HLS?** We’re on shaky

ground here. Let’s just say that because it’s an older school, more established in the 19th century, because of its larger alumni body, Harvard Law School is unique in the number of major writers, judges and politicians that have come from there. I’d leave it at that. **How does “The Yale Book of Quotations” compare to your earlier work,**

*“The Oxford Dictionary of American Legal Quotations”?* “The Yale Book of Quotations” is much more interesting to me because it covers all areas of human life and culture, including the law. And by the time I did the Yale book, I had learned a lot about research and I was able to take advantage of new electronic tools. For the legal book of quotations,

I had maybe a dozen discoveries. But for the Yale book, I had major discoveries on every page. Now, I’m really favoring one child over the other, but because of the new material, including quotations from British and other non-American sources, “The Yale Book of Quotations” is actually the best book of legal quotations. —Emily Newburger



## Top Dog for the Underdog

IF THE WORLD of consumer rights law is a battle against modern-day Goliaths—banks, HMOs, mortgage brokers, credit card companies and others with powerful resources—then F. PAUL BLAND JR. '86 is more than ready to play David. And, he says, the stones in his slingshot include some lessons learned at Harvard Law School from a giant of another kind: the late Vern Countryman, who taught at HLS from 1963 until 1987.

So when the National Consumer Law Center recently honored Bland's contributions to consumer rights advocacy with the Vern Countryman Consumer Law Award, Bland felt a renewed sense of connection to the professor he encountered at HLS more than 20 years ago.

As a staff attorney at Public Justice, a public interest law firm with headquarters in Washington, D.C.—and especially as director of the firm's Mandatory Arbitration Abuse Prevention Project—Bland has fought some of the more egregious injustices committed against consumers by major companies. Though mandatory arbitration is designed to prevent a glut of consumer claims from tying up the courts, he explains, some companies add arbitration clauses to their consumer contracts—including clauses compelling consumers to give up the right to pursue class-action litigation—that make it nearly impossible for customers to bring cases. The provisions take many forms, he adds, but their goal is the same: to make the arbitration process discouragingly opaque and intimidating.

"People think of alternative dispute resolution as having so much promise—giving fairer, faster ways to deal with claims," Bland says. "But what's happening in a lot of cases is that the more powerful party takes advantage. A subprime lender is taking advantage of a poor person, or a car dealer of a consumer, or a nursing home of the person going in."

Bland says his views of the problems faced by the powerless were influenced by Countryman during law school, even though he never took a class with the professor. In his third year, as president of the Journal on Legislation, he solicited Countryman to write an article on an important piece of bankruptcy legislation. At first, Bland found bankruptcy law "unbelievably boring," but



**WHEN HE WAS IN LAW SCHOOL,** Paul Bland knew only that he wanted to pursue public service. He didn't foresee a career as an award-winning champion of consumer rights.

he says he began to understand its importance and its relevance to consumer protection in conversations with Countryman, who repeatedly tried to rouse his interest in it.

"As I got into the world and I started representing low-income people, a lot of the ideas that he was trying to explain have become a lot clearer to me," Bland says. "What I've come to see is that [bankruptcy law] really stands between a lot of people and the equivalent of debtors' prison. It's an incredibly important protection."

Bland's caseload has taken him to state and federal courts across the country, including the U.S. Supreme Court in 2005. But even when he travels, he makes time to meet with other consumer advocates ("a community of lawyers who really stick together," he says) to share some of the finer points of fighting uphill battles.

"The asymmetry of resources is huge," he says, "but it can be fun to be the underdog."

—MARIAH ROBBINS







**PROFILE** *The only “first” that matters to Juliette Kayyem ’95 is our first line of defense*

## First to Arrive

**PERCHED ON THE** 21st floor of an office building next to the Statehouse on Boston’s Beacon Hill, **JULIETTE KAYYEM ’95** has a spectacular view of the city’s waterfront. But when you’re the person in charge of Massachusetts’ homeland security, that view prompts vigilance more than anything else. Recently she was on the lookout for a liquefied natural gas tanker due to arrive in Boston Harbor (the tanker has been identified as a potential terrorist target). And she was beginning to memorize the schedule of low-flying planes coming into Logan. Appointed by Gov. Deval Patrick ’82 in January, Kayyem is the state’s first undersecretary of homeland security. In charge of re-evaluating and overseeing the state’s emergency-preparedness system and budget, she is also the governor’s adviser and liaison with the federal government when security issues arise.

Kayyem brings a unique perspective to her job; of Lebanese descent, she’s the only Arab-American in charge of homeland security at the state level. For much of her life she’d thought of her heritage as part of her personal identity, not her professional one. “When they merged,” she said, “it was a little bit weird.” But at

the same time, she hopes that her presence in a high-profile role might encourage other Arab-Americans to join the national-security world. “I’m recognizing that [my identity] is relevant for people in those communities who might want to go into national security but who have viewed some of the tactics as harsh or onerous or alienating,” she said.

This is not the first time Kayyem’s background has been relevant to her professional life, nor is it the first time she has worked for Patrick. She was a litigator at the U.S. Justice Department when he was assistant attorney general for civil rights during the Clinton administration. But what came to define her time there was her passionate fight against the use of secret evidence to detain about a dozen people—most of whom were Arab men. Kayyem came to believe that within the FBI and the Immigration and Naturalization Service, there was a bias against Arabs and Muslims which the Justice Department had a responsibility to address. She

For Kayyem, terrorism prevention  
*has always been paired with*  
**THE PROTECTION OF civil liberties.**

eventually became an adviser to Attorney General Janet Reno ’63, and in that role she pushed Reno to re-examine the detention policies. She was also the only Arab-American member of the National Commission on Terrorism, formed after the bombings of the U.S. Embassies in Kenya and Tanzania (her appointment caused some dismay among Muslim-American leaders, who pointed out that Kayyem is Christian, not Muslim).

But then came Sept. 11 and a radical shift in the climate of law enforcement. Now, Kayyem admits, being worried about the detention of a handful of Arabs seems like “the good old days.” By the time of the attacks, Kayyem had left Washington for Cambridge, where she worked for several years at Harvard’s Kennedy School of Government as a terrorism expert lecturer and for NBC News as a national security analyst. She still lives there, with her husband, David Barron ’94, a professor at HLS, and their three children. During her tenure at the Kennedy School,

she wrote “Protecting Liberty in an Age of Terror” (2005) with HLS Professor Philip Heymann ’60, a former deputy U.S. attorney general in the Clinton administration. They examined the territory where civil liberties and national security intersect, and delved into some questions most would rather avoid—Is assassination ever acceptable? What kind of coercion can you use in interrogations? Even more pertinent to her new job is a book she co-edited, “First to Arrive: State and Local Responses to Terrorism” (2003), a series of essays by those who would be the first responders to a domestic attack.

While for Kayyem, terrorism prevention has always been paired with the protection of civil liberties, today she faces a sea of other issues. “After having been on the outside,” she said, “you come in and recognize the competing concerns about different policy issues and how to weigh them.” The liquefied natural gas tanker she’d been scanning the harbor for is a case in point. “LNG could be the oil of our children’s future, [but] it’s got security implications; it’s got environmental implications, energy implications,” she said. “They all coexist.” —KATIE BACON



*Juliette Kayyem in the Massachusetts Statehouse in Boston*





PHOTOGRAPHS COURTESY OF VIONNET

**PROFILE** *Arnaud de Lummen LL.M. '02*

## Elements of Style

### WHEN ARNAUD DE LUMMEN LL.M.

'02 was only four years out of law school, he began the relaunch of one of the great Parisian houses of haute couture, pinning his hopes on a legacy and a family dream.

De Lummen first heard about the House of Vionnet as a boy, when his father, a textile engineer who had headed the ready-to-wear departments at Balmain and Ted Lapidus, shared his reverence for the simple and

timeless look of Vionnet clothing. Madeleine Vionnet, widely considered one of the dressmaking geniuses of the 20th century (she invented the bias cut), had turned out exquisite dresses known for flowing, layered styles and the inventive use of fabric, until World War II forced her to shut down. The house lay dormant for years.

But in 1987, de Lummen's father bought the Vionnet name and the rights to the

### Turning an "old name full of dust" into a *symbol of contemporary CHIC*

business, and for the better part of the next two decades pondered what to do with the legacy. "It wasn't yet the right time to launch a name like Vionnet," says de Lummen fils. "Everyone thought it was an old name full of dust."

After HLS, de Lummen worked as an associate in the Paris branches of Cleary Gottlieb and Debevoise & Plimpton, representing clients including Gucci and Yves Saint Laurent. In 2005, sensing that the time had come to reintroduce the Vionnet label, he became CEO of the fledgling "re-startup."

The Vionnet legacy helped de Lummen build a strong management team and

**CUT FROM THE SAME CLOTH:** *Arnaud de Lummen, above, in the House of Vionnet in Paris; below, a model wears one of the new designs.*

lure some of the best designers and professionals in the fashion business. Their mission: to update Madeleine Vionnet's vision, while paying homage to her original designs and using some of the fabrics and details she favored.

De Lummen also drew on his familiarity with contracts. He signed a two-season exclusive distribution agreement with Barneys New York, allowing him to get the business off the ground.

In 2007, Vionnet debuted its ready-to-wear collection—it sold out in less than three weeks, according to Style.com. The fashion world took notice—in *Vogue*, *Harper's Bazaar*, *Elle France* and *Vanity Fair*. This month, Vionnet made its debut on the Haute Couture calendar with its spring-summer 2008 collection, which will be distributed worldwide.

But de Lummen says he is never "satisfied enough." Glued to his BlackBerry day and night, he hovers over every detail of the "house" with the passion of Madeleine Vionnet herself and the drive of someone striving to turn a family name into an empire.

—LINDA GRANT





# Spring reunions

Temperatures were *chilly*, but the camaraderie was **warm**

PHOTOGRAPHS BY KATHLEEN DOOHER



1. George Adams '57, Jack French '57 2. Erica Littlejohn Burnette '97, Calvin Gladney '97  
 3. Adelaja Heyliger '97 4. 1982 classmates  
 5. Deborah Batts '72, Eric Witkin '72  
 6. Richard Flannery '82, Ann Campbell-Flannery '82 7. Verne Vance Jr. '57, James May '57, Joseph Imbriaco '57, George Witte '57 8. Els De Clercq LL.M. '97, Carlota Peon LL.M. '97, Boyko Dimitrachov LL.M. '97 9. Don Cronson '67, Stuart Bloch '67 10. Susanne Wimpfheimer, Michael Wimpfheimer '67 11. Francis Nii Botchway LL.M. '97 12. Nelli Konstantinov, Konstantin Konstantinov LL.M. '97 13. Susan Alexander '67, Andrea Corcoran '67, Joanne Clifford Eaton '67 14. Nick Akerman '72, Richard Baltimore III '72, Rhea Dignam '72, Judith Wilcox Fortman '72 15. 1997 classmates





**LOOKING BACK** *In the nation's capital, a congress of another kind*

## A Global Gathering

**THEY CAME FROM** as far away as Sudan, Brazil, Australia, Guatemala, Indonesia, Taiwan, Russia, Japan and Argentina, and from as near as neighboring Virginia.

During three days in June, more than 600 attended the Worldwide Alumni Congress in Washington, D.C. Between catching up with old friends and making new ones, they heard panel discussions and lectures, and took in art exhibits and a twilight dinner cruise on the Potomac. Venues included the Supreme Court—where they were hosted by four of the sitting justices—the Library of Congress (pictured, right), the Smithsonian, the Corcoran Gallery of Art and George Washington's home at Mount Vernon, where Virginia Gov. Tim Kaine '83 and his wife, Anne Holton '83, welcomed them.

There were, of course, some wonderful repasts, but the main feast was intellectual. Leading politicians, policy-makers and scholars led discussions on the international economy, cybersensorship and human rights, terrorism and constitutional law, environmental protection, diplomacy and, of course, the legal profession of the future.

For a photo gallery from the gathering, go to [www.law.harvard.edu/alumni/wac2007photos.htm](http://www.law.harvard.edu/alumni/wac2007photos.htm).



GUSTAV FREEDMAN

**LOOKING FORWARD**

## Calendar

{COMING ATTRACTION}



ANTON GRASSL

**MARCH 14-15, 2008**  
*Public Interest Reunion*  
Harvard Law School  
617-495-4698

**JULY 17, 2007**  
HLSA of Massachusetts  
*Annual Summer Reception*  
Downtown Harvard Club of  
Boston  
617-495-4698

**JULY 19, 2007**  
HLSA of New York City  
*Annual Summer Reception*  
Sotheby's  
617-495-4698

**OCT. 25-28, 2007**  
*Fall Reunions Weekend*  
Classes of 1952, 1962, 1977, 1987,  
1992, 2002 & Emeritus Club  
Harvard Law School  
617-495-3173

**NOV. 8, 2007**  
*HLS Leadership Conference*  
Harvard Club of New York City  
617-495-3051

**MAY 1-4, 2008**  
*Spring Reunions Weekend*  
Classes of 1958, 1968, 1973,  
1983, 1998  
Harvard Law School  
617-495-3173

**MAY 2-4, 2008**  
*HLSA of Europe*  
617-495-4698

**JUNE 5, 2008**  
*Commencement*  
Harvard Law School  
617-495-3129

**SEPT. 19-21, 2008**  
*Celebration 55: The Women's  
Leadership Summit*  
Harvard Law School  
617-495-4698

**OCT. 23-26, 2008**  
*Fall Reunions Weekend*  
Classes of 1948, 1953, 1963, 1978,  
1988, 1993, 2003 & Emeritus Club  
Harvard Law School  
617-495-3173

For the latest on Harvard Law  
School Association events, go to  
[www.law.harvard.edu/alumni/  
association/calendar.htm](http://www.law.harvard.edu/alumni/association/calendar.htm).

# In Memoriam

## OBITUARY INFORMATION

Details may be sent to *Harvard Law Bulletin*, In Memoriam Editor, 125 Mount Auburn St., Cambridge, MA 02138

### 1920-1929 JEROME E. HEMRY LL.M.

'29 of Oklahoma City died Dec. 30, 2006. He was an Oklahoma City attorney whose legal career and public service work spanned three-quarters of a century. At the time of his death, at the age of 101, he was of counsel at Hemry, Hemry & McDoniel, a firm he founded in 1933. A professor at Central Oklahoma School of Law from 1931 to 1941, he was president of the Oklahoma City University Alumni Association and the Oklahoma Municipal Attorneys Association.

### 1930-1939 MERLE W. HART '35-'37 of

Concord, N.C., died April 18, 2007. Formerly of New Castle, Pa., he was a judge and magistrate in Pennsylvania. After retiring from the bench, he served as a federal arbitrator with the Federal Mediation and Conciliation Service. He played professional football for the Boston Redskins. During WWII, he served in the U.S. Coast Guard.

**WALTER T. BURKE '36** of Natick, Mass., died March 14, 2007. He was a partner at Burke & Burke Attorneys in Natick and Sherborn, Mass., and served in the Massachusetts House of Representatives. From 1959 to 1977, he was a state representative for the 5th Middlesex District in Massachusetts. He also headed the Natick Democratic Town Committee and was a trustee of Morse Institute Library.

**ERNEST L. JOSEM '36** of Norwalk, Conn., died Feb. 22, 2007. A lifelong resident of Norwalk, he served on the Norwalk Charter Revision Commission in 1947 and from 1957 to 1958. He served in executive positions for many civic organizations, including the School Building Committee, the Board of Education and Norwalk Community College. His court appointments included serving as a special master for pretrials, a fact finder and an arbitrator.

**JOHN E. LAWRENCE '36** of Hamilton, Mass., died March 27, 2007. He was involved in his family's business supplying New England mills with cotton. Early in his career, he was an attorney at Goodwin, Procter & Hoar in Boston. For more than 50 years, he was a board member of Massachusetts General Hospital. He was also a trustee of Groton School for 25 years and an overseer of Harvard from 1959 to 1962, and he served as a director of General Electric and the State Street Investment Corp. He was president of the Hinduja Foundation in New York. During WWII, he was involved in training naval air intelligence personnel. As a staff

member of Adm. William Halsey's, he was present at the surrender of the Japanese in Tokyo Bay in 1945.

**RICHARD E. GUGGENHEIM '37** of Cincinnati died June 18, 2006.

**RICHARD S. ZEISLER '37-'38** of New York City died March 6, 2007. He was a private investor and a collector of 20th-century European art. He was a life trustee of the Museum of Modern Art, a life fellow of the Metropolitan Museum of Art and a governing life member of the Art Institute of Chicago.

**ARTHUR C. HOENE '38** of Wickenburg, Ariz., died March 20, 2007. Formerly of Duluth, Minn., he served in the U.S. Coast Guard for 22 years, retiring with the rank of commander. During WWII, he served with a convoy in the North Atlantic. After the war, he was a Coast Guard hearing officer with the Judge Advocate General's Office in Portland, Ore., and San Francisco.

**BERNARD MELTZER LL.M. '38** of Chicago died Jan. 4, 2007. A labor law scholar and longtime professor at the University of Chicago Law School, he helped draft the charter of the United Nations. He served as a prosecutor at the Nuremberg war crime trials and coordinated a team of lawyers who focused on the economic crimes of the Nazi regime. After Nuremberg, he joined the University of Chicago Law School faculty, where he developed the nation's first law course on international organizations. In 1985 he retired from the school but continued to write and consult, as well as work for Sidley and Austin in Chicago. He was a chairman of the Cook County Hospital Committee, a member of the Illinois Civil Service Commission and a salary arbitrator for Major League Baseball. He was also an emeritus fellow of the College of Labor and Employment Lawyers. During WWII, he served in the U.S. Navy in the Office of Strategic Services. He was the father of HLS Professor Daniel J. Meltzer '75.

### 1940-1949 MILTON KAPLAN '40 of

Getzville, N.Y., died Feb. 26, 2007. A professor of law at the State University of New York at Buffalo, he taught municipal and land-planning law for more than 20 years. After retiring from teaching, he was of counsel at Magavern and Magavern in Buffalo. He was also an adjunct professor at SUNY School of Architecture and Environmental Design. In the early 1980s, he worked as a consultant in planning law in Dhaka, Bangladesh; in Bandung, Indonesia; and for the Navajo Nation.

**PIERCE BUTLER '40-'41** of Minneapolis died March 3, 2007. He practiced corporate, mining and timber law at Doherty, Rumble & Butler in St. Paul. He was the third generation to practice at the firm, beginning with his grandfather, U.S. Supreme Court Justice Pierce Butler. He participated in the founding of the Minnesota International Center of the University of Michigan and was active in many civic organizations, including the Minnesota Historical Society, the Hill Reference Library and the Minnesota Science Museum. He was also consul for the Netherlands for 20 years. During WWII, he served in the U.S. Army as a second lieutenant in the Corps of Engineers, and he was an intelligence officer in Japan under Gen. Douglas MacArthur.

**ANDREW H. COX '41** of Providence, R.I., died Jan. 24, 2007. He was a longtime partner at Ropes and Gray in Boston, retiring in 1989. He was a veteran of WWII.

**JEREMIAH J. GORIN '41** of Providence, R.I., died Jan. 9, 2007. He practiced law in Rhode Island for 50 years and was a senior partner at Licht and Semonoff. He served as chairman of the Rhode Island Bar Association Committee on Legal Services. He was also president of the Jewish Community Center of Rhode Island. During WWII, he served in the U.S. Navy.

**FREDERICK DOPPELT '43** of New York City died Nov. 18, 2006. A lawyer for six decades, he was a solo practitioner specializing in the fields of estates, trusts and taxes. He was village justice of Saddle Rock, Great Neck, N.Y., for 30 years. While at HLS, he was the editor of the *Harvard Law Review*. During WWII, he was a decorated lieutenant and navigator in the China-Burma-India theater.

**ALLEN E. SUSMAN '43** of Beverly Hills, Calif., died Jan. 29, 2007. An entertainment lawyer, he was a founding partner of Rosenfeld, Meyer & Susman in Beverly Hills and an adjunct professor of law at Southwestern University from 1947 to 1951. In 1990, the Beverly Hills Bar Association named him Entertainment Lawyer of the Year. He was a fellow of the American Bar Foundation.

**HERBERT R. SILVERS '44** of Johnson City, Tenn., died April 18, 2006. A solo practitioner, he established his law practice in Greeneville, Tenn., in 1952, and he taught business law and political science classes at East Tennessee State University, Greeneville campus. He was also a director of the ETSU Foundation. In 1962, he ran for Congress unsuccessfully. He was instrumental in found-

ing the Nolichuckey Holston Area Mental Health Center. During WWII, he registered as a conscientious objector and served as a clinical psychologist in U.S. Army hospitals in England. He received a commission as a medical administrative officer.

**HAROLD C. GAEBE JR. '45** of St. Louis died Dec. 2, 2006. He was president of J.B. Gury Manufacturing and a Webster Groves, Mo., municipal judge. During his career, he was a partner at Nouss, Bamberg and Gaebel and at Thompson, Walther, Shewmaker and Gaebel. He was a member of the board of governors of the Missouri Bar Association and president of the Metropolitan Bar Association of St. Louis. He also was a junior and senior warden of Emmanuel Episcopal Church. During WWII, he served in the U.S. Marine Corps and participated in the invasions of the Marshall Islands, Guam, Okinawa and Iwo Jima, retiring with the rank of major.

**PETER L. QUATTROCHI '46-'48** of Mount Pleasant, S.C., died April 9, 2007. For more than 30 years, he provided management and engineering consulting and executive searches to a network of four corporations. He also held management positions at General Electric and other manufacturing firms. During WWII, he served in the U.S. Navy in the Pacific.

**OREN M. RABIN '46-'47** of Lake Stevens, Wash., died Jan. 15, 2007, on his birthday. He served in the U.S. Navy during WWII.

**MARSHALL S. SIFF '46-'47** of Chatsworth, Calif., died Feb. 11, 2007. He practiced law in California's San Fernando Valley for nearly 45 years, until his retirement in 2000. A 1951 graduate of the Los Angeles Police Academy, he briefly served as a marshal. He was a 1944 graduate of the U.S. Merchant Marine Academy and a veteran of WWII.

**TALBOT RAIN LL.M. '47** of Dallas died Sept. 3, 2006. A securities law specialist, he was of counsel at Locke Purnell Rain Harrell, now Locke Liddell & Sapp. He co-founded one of its predecessor firms, Rain Harrell Emery, in 1965. Prior to that, he practiced law at Thompson, Knight, Wright & Simmons in Dallas and taught securities law at Southern Methodist University. He was president and life trustee of the Dallas Historical Society and a director of Southwestern Life Insurance Co. and Republic Gypsum Co. During WWII, he was a first lieutenant in the U.S. Marines and was in the fourth wave of Marines to land on Iwo Jima. Of the dozen men who landed with his unit, only he and another man survived uninjured. He received the Bronze Star for his 36 days of fighting and later served with the occupation force in Japan. In 2003, he self-published "Remembering Iwo: A Personal Memoir."

**JOHN F. CRANE '48** of Brewster, Mass., died March 6, 2007. A longtime resident of Nutley, N.J., he was a judge in the New Jersey court system for 20 years. Appointed to the judiciary in 1960, he most recently served as the presiding judge of the Appellate Division of the New Jersey Superior Court. Earlier in his career, he was an assistant prosecutor of Essex County, deputy attorney general and deputy state treasurer. After retiring from the bench, he served as an arbitrator and mediator and was president of the New Jersey Retired Judges Association. During WWII, he served in the U.S. Navy as a gunnery officer aboard the USS Lexington and was awarded the Silver Star and the Bronze Star.

**JOSEPH E. MOUKAWSHER '48** of Groton, Conn., died Dec. 16, 2006. For 57 years, he practiced law in Connecticut, where he was a prosecutor and a municipal attorney. As an attorney for Groton, he helped convert the borough to a city. He was also a coroner for New London County. In 1996, he helped found Moukawsher & Walsh with his son. During WWII, he served in a mortar platoon with the 88th Division in Italy and was a statistician in the Philippines.

**MANUEL R. SCHWAB '48** of Middletown, Calif., died Feb. 16, 2007. A longtime resident of Binghamton, N.Y., he practiced law there until retiring to California in 1998.

**JACK D. VOSS '48** of Lancaster, Ohio, died March 24, 2007. He was a longtime employee of Anchor Hocking Corp. in Lancaster, joining the company in 1962 as general counsel. For 17 years, he was vice president and general manager of its international division. After his retirement, he formed Voss International Consulting and worked as an international business consultant. Earlier in his career, he was a partner at Crowell and Leibman in Chicago. During WWII, he served in the U.S. Navy aboard the USS Baldwin in the Atlantic and Pacific and was with the invasion fleet for the landings at Omaha Beach on D-Day.

**CLIFFORD S. BURDGE JR. '49** of Avon, Conn., and Windham, Vt., died Feb. 9, 2007. He was a longtime partner at Reid and Riege in Hartford, where he was a member of the individual clients group and president. He briefly worked for Hartford Accident and Indemnity Co. before joining Reid and Riege in 1952. He was active with the Connecticut Institute for the Blind/Oak Hill and the Village for Families and Children. A president and life fellow of the Connecticut Bar Foundation, he was also a fellow of the American College of Trust and Estate Counsel and a member of the Estate and Business Planning Council of Hartford. During WWII, he served as an officer in the U.S. Army Air Forces.

**VICTOR O. GERETZ '49** of West Hills, Calif., died Dec. 7, 2006. He was vice president and general counsel of Transpacific Industries Corp. in Los Angeles.

**FRANK A. KELLY JR. '49** of Newington, Conn., died March 13, 2007. He worked for Aetna Life & Casualty for 25 years, retiring as assistant counsel. He was a trustee for St. Mary's Church in Newington. During WWII, he served in the U.S. Army in the Pacific theater.

**ROGER W. YOUNG '49** of Long Beach, Calif., died Jan. 21, 2007. An expert in tax and estate matters, he was an attorney at Taubman, Simpson, Young & Sulentor in Long Beach for 54 years. He joined the firm in 1952, was named a partner in 1954 and retired in 2003, continuing with the firm on a consulting basis. He was a contributing editor to "Estate Administration," a publication of the Continuing Education of the Bar. He was a governor of the Long Beach Bar Association and president of the Long Beach Estate Planning and Trust Council. During WWII, he spent four years doing cryptanalysis work for the U.S. military.

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**1950-1959** **PATRICK E. DRESSLER '50** of Norwalk, Conn., died March 3, 2007.

**DONALD R. GRANT '50** of Wolfeboro, N.H., died March 28, 2007. For 16 years he served on the Appeals Court of Massachusetts, retiring in 1988 as senior justice. He was among the first to serve on the newly formed court in 1972, and he drafted the rules of the court and wrote its style manual. During his tenure, he wrote 1,152 opinions. Prior to joining the court, he spent more than 20 years at Ropes & Gray in Boston. During WWII, he served in the U.S. Navy, attaining the rank of lieutenant.

**ALBERT J. MILLUS '50** of Brooklyn, N.Y., died March 26, 2007. He was executive director of the New York State Insurance Fund, which he had joined in 1967. He later formed Albert J. Millus & Associates and specialized in workers' compensation law. From 1952 to 1958, he served in the FBI and was a bureau chief in Los Angeles and San Francisco. He also served in the U.S. Army.

**SIDNEY D. PINNEY JR. '50** of Avon, Conn., died Jan. 3, 2007. A partner at Murtha, Cullina, Richter & Pinney in Hartford for more than 40 years, he lectured on estate planning and was a fellow of the American College of Trust and Estate Counsel. He was a member of the Wethersfield Town Council, a trustee of the Hartford Conservatory of Music and president of the Historic Wethersfield Foundation. After retiring, he volunteered legal services to several community organizations. A pilot, he was a member of the Connecticut Valley Fliers. During WWII, he served as an officer in the



U.S. Army Air Forces.

**JAMES POWERS '50** of Phoenix died Jan. 21, 2007. He specialized in civil litigation and federal tax issues and was chairman of Powers, Boutell, Fannin & Kurn in Phoenix, a firm he originally co-founded as Powers & Rehnquist in 1960 with future Chief Justice William Rehnquist. He was a founding director of the Kemper and Ethel Marley Foundation. In 1979, he published a probate mystery, "Estate of Grace." In the early 1950s, he was a trial attorney in the Office of Chief Counsel of the Internal Revenue Service in Washington, D.C., and, later, chief prosecutor in the IRS's Los Angeles office.

**JAMES K. ROBINSON '50** of Rochester, N.Y., died Feb. 9, 2007. For more than 30 years, he was an attorney at Eastman Kodak, and he was a board member for Rochester Childfirst Network for 40 years. He was also active in Planned Parenthood and what is now the United Way of Greater Rochester.

**KENNETH KEONG LAU LL.M. '51** of Honolulu died Jan. 30, 2007. A University of Hawaii administrator, he was special assistant to the president, vice president for business affairs and secretary of the university. He also taught business law and contracts. Early in his career, he practiced law briefly, worked for the Legislative Reference Bureau and helped found the East-West Center, an education and research organization. After retiring in 1989, he consulted with the university on collective bargaining and exchange programs with Chinese universities. From 1942 to 1950, he served in the U.S. Army, including as a staff member of Gen. George C. Marshall's China Mission for two years. He received the Bronze Star and retired as a lieutenant colonel.

**IRWIN LEFF '51** of San Francisco died Oct. 25, 2006. For 46 years, he was a labor lawyer in San Francisco. Counsel to the State Psychological Association, he was chairman of the San Francisco Mental Health Association. After retiring from law, he was chief financial officer of his son's construction company and was involved in developing affordable housing in Sonoma County.

**RICHARD C. MEECH Q.C. LL.M. '51** of Toronto died Jan. 3, 2007. He was a partner emeritus and counsel at Borden Ladner Gervais in Toronto, where he specialized in business and corporate law. A chairman of the business law section of the International Bar Association, he was a director or officer of 27 corporations, and for 34 years, he represented Thailand as consul or consul general. He was also president of the HLSA of Ontario.

**ALFRED W. MEYER LL.M. '51** of Valparaiso, Ind., died Jan. 28, 2007. A professor

emeritus and dean of the Valparaiso University School of Law, he was dean from 1969 to 1977 and from 1982 to 1983. A graduate of Valparaiso and its law school, he taught on the law faculty from 1961 until 1994. He also taught at Indiana University School of Law-Bloomington and was a visiting professor at the University of South Carolina School of Law, New York Law School and Stetson University College of Law. After retiring, he was named a Sagamore of the Wabash, Indiana's highest individual honor, by Gov. Evan Bayh. He later moved to Palm Desert, Calif., took the California bar exam and, at the age of 65, became a practicing attorney in California. He was a director of a legal aid clinic and of Martha's Village, an organization serving the homeless. He served as a U.S. Navy air cadet during WWII and was a U.S. Army JAG officer during the Korean conflict.

**ROBERT E. MORRIS '51** of Stamford, Conn., and Delray Beach, Fla., died Feb. 10, 2007. He was a solo practitioner in Stamford, where he served on the board of the local chapter of the American Red Cross and as president of the Long Ridge Swim Club. He was also counsel to and a board member of Temple Sinai in Stamford. Earlier in his career, he was an attorney at Paul, Weiss, Rifkind, Wharton & Garrison in New York City. From 1943 to 1948, he served in the U.S. Army.

**JAMES D. "J.D." WHITE '51** of Wichita, Kan., died Jan. 14, 2007. A solo practitioner in Kansas for 50 years, he specialized in oil and gas law. During WWII, he was a combat glider pilot, and he flew L-5s as a member of the 25th Liaison Squadron during the liberation of Mindanao Island in the Philippines. He later served for two years as a JAG officer in the U.S. Air Force.

**JOHN F. GALLAGHER '52** of Colorado Springs, Colo., died Dec. 22, 2006. He was a district court judge of Colorado's 4th Judicial District for nearly 25 years. A presiding judge of the juvenile court, he was credited with modernizing the juvenile court in the 4th Judicial District and was known for his work advocating for children and families. He was nominated to be a Colorado Supreme Court justice four times. After leaving the bench, he practiced arbitration and mediation in Colorado Springs and Boulder. He also served on numerous boards and commissions, including as president of the El Paso County Bar Association, the Juvenile Court Judges Association and the Colorado Bar Grievance Committee.

**BERNARD L. GOLDSTEIN '52** of New York City died March 10, 2007. He was a partner at Kaufmann, Goldstein & Gartner in New York City.

**JAMES P. "PAT" MOWER '52** of Modesto,

Calif., died Jan. 23, 2007. For more than 50 years, he was a solo practitioner in Modesto, where he focused his practice on criminal defense, estate planning/probate and family law. He was an active member of the Church of Jesus Christ of Latter-day Saints, 7th Ward. During WWII, he served in the U.S. Merchant Marines in the South Pacific.

**VICTOR D. ROSEN '52** of Maui, Hawaii, died Feb. 20, 2007. A tax and estate-planning attorney, he was a senior partner at Wendel, Rosen, Black & Dean in Oakland, Calif., where he practiced for more than 40 years. He taught taxation law as a guest lecturer at the law schools of the University of California, Berkeley, and the University of California, San Francisco, as well as the University of Southern California Tax Institute. He was state chairman for the California State Bar Committee on Taxation and chairman of the State Bar Taxation Advisory Commission. He served in the U.S. Air Force for two years.

**THOMAS F. EAGLETON '53** of St. Louis, Mo., died March 4, 2007. A three-term U.S. senator from Missouri, he wrote the Eagleton Amendment that ended U.S. involvement in the Vietnam War. His amendment to a defense appropriations bill cut off funding for the bombing in Cambodia. In 1956, he was elected circuit attorney of St. Louis, and four years later, he was elected attorney general of Missouri. In 1968, he was elected to the Senate and won re-election in 1974 and 1980. He was a principal proponent of the Individuals with Disabilities Education Act and co-wrote the bill that created Pell Grants for college students. He was also one of the principal sponsors of the Clean Air Act of 1970 and the Clean Water Act of 1972. In 1972, he was George McGovern's vice presidential nominee, but he withdrew from the race after it was revealed that he had been hospitalized years earlier for depression. After retiring from the Senate, he joined Thompson & Mitchell, now Thompson Coburn, and from 1987 to 1999, he was a professor of public affairs at Washington University in St. Louis. He wrote three books and was working on a memoir of his political career. He served in the U.S. Navy.

**JOHN F. MCGRORY '53** of Sequim, Wash., and Wayzata, Minn., died Feb. 22, 2007. He had a 40-year career at Cargill, retiring in 1994 as general counsel, senior vice president and secretary to the board of directors. Active in the Catholic Church, he was chairman of St. Paul Archdiocese School Board and chairman of the finance committee for Queen of Angels in Port Angeles, Wash. He was also a trustee of the Voyageur Outward Bound School and chairman of Outward Bound's National Safety Committee. In the 1960s, he served as chairman of the Henne-

pin County Republican Party in Minnesota, and he was a delegate to the Republican Convention in 1964. From 1951 to 1953, he was a lieutenant in the U.S. Navy.

**WARD L. MAUCK '54** of Stonington, Conn., died April 6, 2007. He was a securities lawyer, public utility house counsel, investment banker, law firm administrator and president of the American Institute of Marine Underwriters. He was also a member of Stonington's Planning & Zoning Commission.

**N. THOMPSON POWERS '54** of Penn Valley, Calif., died Jan. 29, 2007. Previously of Chevy Chase, Md., he served as the first executive director of the U.S. Equal Employment Opportunity Commission and was a managing partner at Steptoe & Johnson. He began his career as an associate at Steptoe, and in 1961, he joined the U.S. Labor Department as deputy solicitor and special assistant to then Labor Secretary Willard Wirtz. In 1965, Powers, who had helped draft the 1964 Civil Rights Act, was appointed acting executive director of the newly created EEOC. He later led an international labor management project in Brazil before returning to Steptoe, where he specialized in employment law and won two cases before the U.S. Supreme Court. His last position was chief employment lawyer at Motorola in Phoenix. A college football and baseball player, he was a third-round selection of the Washington Redskins in the 1951 National Football League draft and was drafted by Major League Baseball's Pittsburgh Pirates, but instead he chose to attend HLS. He served as a lieutenant in the U.S. Navy from 1954 to 1957.

**ALAN D. BLOCK '55** of Mission Viejo, Calif., died Feb. 4, 2006. He was head of Block & Osofsky in Torrance and specialized in personal injury and criminal defense. He later served as an attorney consultant at the Community Legal Center, Orange County, Calif.

**PHILIP N. COSTELLO JR. '55** of Madison, Conn., died April 14, 2007. In 1976, he founded his own law firm in Madison, where he worked for 20 years. For 35 years, he was Madison's town attorney. A member of the Republican State Central Committee, he was elected to the Connecticut General Assembly as state representative in 1969 and elected state senator in 1971. From 1984 to 1991, he was commissioner of the Department of Liquor Control. He was president of the New Haven County Junior Bar Association and president of the Madison Jaycees. A cartoonist, he wrote "Gullible's Travels Thru Harvard" in 1955 and sold 2,000 copies to raise funds for his HLS class.

**BURTON REIF '55** of Chicago died April 5, 2007. He practiced real estate law and was a

steward for the Rogers Park area in Chicago, where he lived for most of his life. He led efforts to protect a lakefront stretch of Sheridan Road from high-rise development and served as chairman of the Sheridan Road Planning and Development Committee from 1988 to 1994. He also served as chairman of the 49th Ward's Citizens Zoning Committee. In the 1960s, he was president of the Rogers Park Community Council.

**JOHN R. ALGER '56** of Osterville, Mass., died Jan. 16, 2007. He was a solo practitioner in Osterville, where he focused his practice in the areas of probate and land-use law. For 20 years he was moderator of the town of Barnstable, and he served on many community boards, including that of the Historical Society, the Free Library, the Osterville Village Association and Three Bays Preservation. A incorporator of the Cape Cod Co-Operative Bank, he served as a director of the bank for 32 years.

**ROBERT POPPER '56** of Kansas City, Mo., died Feb. 9, 2007. A professor and dean of the University of Missouri-Kansas City School of Law, he taught criminal law, criminal procedure and constitutional law. After a two-year term as interim dean, he served as dean of the law school from 1984 to 1993. He was chairman of many of the law school's committees, including the Task Force on Ethics and Conflicts of Interest. He was the author of the book "Post Conviction Remedies in a Nutshell" and many articles. A vice president of the Western Missouri Chapter of the American Civil Liberties Union, he was named Civil Libertarian of the Year in 1991. In 1956, he served in the U.S. Army and was stationed at Fort Knox, where he guarded the nation's gold.

**ROGER NOALL '58** of New York City and Naples, Fla., died March 29, 2007. He worked for KeyCorp in Cleveland, where he held a variety of executive positions, including senior executive vice president, chief administrative officer, and general counsel and secretary. Beginning in 1983, he worked in Cleveland for various bank holding companies, including Centran Corp. and Society Corp. From 1967 to 1983, he held executive positions at Bunge Corp., an agribusiness, and earlier in his career, he was a partner at Olwine, Connelly, Chase, O'Donnell & Weyher in New York. During his lifetime, he completed 13 New York City Marathons, summited Mt. Kilimanjaro and hiked extensively in Africa and Europe.

**PAUL S. TURNER '58** of Los Angeles died Oct. 7, 2006. He practiced banking and commercial law and was assistant general counsel for Occidental Petroleum Corp. in Los Angeles. He was counsel to the Association for Finance Professionals, formerly Treasury Management Association, and he

was an official adviser to the uniform law commissioners who wrote Article 4A of the Uniform Commercial Code and revised UCC Articles 3, 4 and 5. He wrote a number of articles and books, including the guide "Negotiating Wire Transfer Agreements."

**TOM WATSON BROWN '59** of Marietta, Ga., died Jan. 13, 2007. An Atlanta lawyer, he specialized in corporate and broadcasting law and was chairman of Spartan Communications until he sold the family-owned chain of television stations in 2000. A president and director of the executive committee of the Atlanta Legal Aid Society, he was also president and trustee of the Watson-Brown Foundation, which supports higher education and historic preservation. A benefactor of the University of Georgia and Mercer University Press, he donated \$2 million to endow the press and donated his 10,000-volume library to Mercer's Tarver Library. He also was a recipient of the Martin Luther King Jr. Center's community service award for peace and justice.

**JOHN E. "JACK" MCGOVERN JR. '59** of Lake Forest, Ill., died April 10, 2007. A longtime resident of Lake Forest, he specialized in corporate law and securities. He was a partner at Wildman, Harrold, Allen & Dixon in Chicago, joining the firm in 1987 and becoming semiretired several years ago. He previously practiced at Wilson & McIlvaine. From 1972 to 1984, he was an alderman in Lake Forest, and he served for 10 years as a director of Lake Forest Hospital and as a trustee of Lake Forest College. He was also a trustee of the Ravinia Festival, a series of outdoor concerts, and chairman and director of the Chicago Heart Association. He served in the U.S. Navy aboard a destroyer, attaining the rank of lieutenant.

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**1960-1969 JOHN G. "JACK" CAMPBELL '61** of Winnetka, Ill., died March 28, 2007. A Chicago attorney since 1962, he was a founding partner of McCullough, Campbell & Lane. He also chaired the federal taxation section of the state bar association. He served as a lieutenant in the U.S. Navy.

**CHARLES L. GRIMES '61** of Chadds Ford, Pa., died Feb. 5, 2007. He was an independent financial adviser and investor and a partner at Grimes & Winston in New York City. A rower at Yale University, he was a member of the varsity crew team that won a gold medal at the 1956 Summer Olympics in Melbourne, Australia.

**ANTHONY M. VERNAVA '62** of New Hyde Park, N.Y., died April 7, 2007. Formerly of Michigan, he was assistant dean and law professor at the University of Detroit. He was a member of the faculty there for 10 years and later served as a visiting law professor at other universities. His writ-

ings were published in many tax and law journals, including the Columbia Law Review. Prior to his tenure at Detroit, he was a corporate tax attorney in New York City. He was involved in charity and economic works in Lima, Peru.

**DAVID J. KAYNER '63-'64** of Oak Brook, Ill., died March 6, 2007. He was a corporate secretary and general counsel of Inland Real Estate Corp. From 1973 to 2001, he was a partner at Piper Rudnick in Chicago, where he concentrated his legal practice in real estate law and served as managing partner in the 1980s. He also served as an adjunct professor at the John Marshall School of Law.

**SIDNEY FEINBERG '64** of New York City died April 20, 2007. An entertainment attorney for 43 years, he was a founding partner of Leavy Rosensweig & Hyman in New York City. He represented stars of stage, film and television. Most recently, he was of counsel at Lazarus & Harris.

**HERBERT F. GOODRICH JR. '67** of Wyndmoor, Pa., died March 16, 2007. He spent his career at Dechert in Philadelphia, where he was chairman of the corporate department and served on the policy committee. From 1974 to 1978, he worked for Dechert in Brussels, Belgium. In 2005, he received an award from the Philadelphia Bar Association for his contributions to the business community and to civic causes and for mentoring young lawyers. He was chairman of the board of Chestnut Hill Healthcare and was involved in the centennial celebration of Chestnut Hill Hospital.

**WILLIAM P. ROBINSON JR. '67** of Norfolk, Va., died Dec. 18, 2006. A defense attorney at Robinson, Shepherd & Anderson in Norfolk, he was also the Democratic representative for the 90th District in the Virginia House of Delegates from 1981 to 2001. As a delegate, he fought for transportation and housing reform, serving as co-chairman of the Transportation Committee and heading the assembly's black caucus.

**RICHARD M. CION '68** of Westport, Conn., died March 27, 2007. He was a private consultant and senior executive vice president of Farley Industries in Fairfield, Conn.

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**1970-1979 MALCOLM SMITH LL.M. '72 S.J.D. '76** of Melbourne, Australia, and Tokyo died June 22, 2006. An authority on Japanese law, he was a pioneer in the development of Asian legal studies in Australia. He was a founding director of the University of British Columbia's Japanese Legal Studies Program, and in 1987, he became founding director of the University of Melbourne's Asian Law Centre. From 2000 to 2004, he held the university's Foundation Chair in Asian Law, and he then accepted an appointment as professor of law at Chuo Uni-

versity in Japan, where he was the first Australian to teach Japanese law, in Japanese, to Japanese students.

**LOUIS E. VINCENT '73** of El Cerrito, Calif., died June 23, 2006. He practiced law for 33 years, 27 of which he worked for Pacific Gas & Electric Co. in San Francisco. Active at St. Jerome Church, he served on the pastoral council.

**ROGER A. WEBER '73** of Mount Lookout, Ohio, died Feb. 20, 2007. A labor attorney, he was a partner at Taft, Stettinius & Hollister in Cincinnati, where he was chairman of the labor and employment department. He was listed in "The Best Lawyers in America" every year since 1991. He handled more than 200 cases in arbitration and participated in administrative proceedings before the National Labor Relations Board, the Occupational Safety and Health Review Commission and the Equal Opportunity Commission. A native of northwest Ohio, he became the state's youngest Eagle Scout at the age of 12.

**DANIEL A. DEGNAN LL.M. '74** of Jersey City, N.J., died March 16, 2007. He was president of Saint Peter's College and, before that, dean of Seton Hall Law School. He led Saint Peter's in its transformation from an all-commuter school. Ordained a priest in 1966, he held several teaching and administrative assignments at a number of institutions, including HLS, Boston College, Syracuse Law School and Georgetown University Law Center. An expert on the legal theories of St. Thomas Aquinas, he was in the process of producing a treatise on the subject. He served in the U.S. Navy from 1944 to 1946.

**FRANK TAIRA SUPIT ("FRANK TJIA") '74** of Jakarta, Indonesia, died Jan. 29, 2007. He was an international lawyer, a merchant banker and founder of an Indonesian airline. In 1980, he founded a corporate law firm, Makarim & Taira, in Indonesia, and in 1991, he founded PT Sigma Batara, a domestic merchant bank that pioneered the development of Indonesia's domestic bond market. Most recently, he was CEO of PT Efata Papua Airlines, whose inaugural flight took place in January 2006. Early in his career, he practiced law with Coudert Brothers in New York City. The first Indonesian to earn a J.D. from HLS, he later served as the administrative director of HLS's East Asian Legal Studies Program.

**WALTER G. BLEIL '75** of Pittsburgh died Jan. 30, 2007. He was of counsel to Goldberg, Kamin and Garvin and was a longtime partner of Reed Smith. He had also been an attorney at Doepken Keevican & Weiss and was an adjunct professor at St. Francis University Graduate School of Industrial Relations. He served on several boards, including the YMCA of Greater Pittsburgh,

the American Diabetes Association and Neighborhood Legal Services.

**BRUCE DAVID BECKER '79** of Portland, Ore., died Feb. 2, 2007. He was chief operating officer of United Communications in Bend, Ore. He moved to Portland in 2000, after living in Chicago for 20 years, to work for GST Telecommunications as general counsel and later CEO. In Chicago, he was an employee of Ameritech Corp., where he worked began working in 1988. In 1996, he was named general counsel for Ameritech Long Distance Industry Services, a business unit of Ameritech. He was president of the Chicago Bar Foundation and served on the board of the American Corporate Counsel Association.

**LISA GOLDBERG '79** of New York City died Jan. 22, 2007. President of the Charles H. Revson Foundation, she joined the foundation as a program officer in 1982 and was named president in 2003. Under her leadership, the foundation funded a number of prominent public television series, including "Heritage: Civilization and the Jews" and "Eyes on the Prize." During her career, she was a senior staff member and legal counsel to President Carter's Commission for a National Agenda for the Eighties. She was also a consultant to the Federal Court of Appeals of the District of Columbia and director of a Boston family court program. She was the wife of New York University President John Sexton '78.

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**1980-1989 MARTHA A. MCPHEE '80** of Minneapolis died Feb. 6, 2007. A former corporate lawyer, she recently was named CEO of the Twin Cities area's Animal Humane Society. She served as a board member for a number of organizations, including Long Lake Hounds, Medina Horse Association and Pets Across America. After Hurricane Katrina and Rita, she led a team of animal welfare workers rescuing animals in a mobile animal hospital in Texas. During her career, she was chief operating officer of Minnesota Public Radio, served as assistant county attorney in Anoka County and worked as an attorney for Dorsey & Whitney.

**ANDREW W. "ANDY" LOEWI '82** of Denver died April 8, 2007. He was a partner at Brownstein Hyatt in Denver and most recently headed the firm's pro bono practice committee. He joined the firm in 1986 and was named a partner three years later. Earlier in the 1980s, he was a deputy district attorney. Posthumously, the governor of Colorado proclaimed Loewi's birthday, May 15, as Andy Loewi Day.

**YUNBIN TANG LL.M. '82** of Germantown, Md., died Feb. 3, 2006.

## A Conversation with Peter C. Krause '74

**You graduated from Manhattan College in 1970 and were accepted into HLS the same year. Why did you delay attending?**

Well, during my senior year in college, the Vietnam War was hot. And thanks to my birth date, I was the number one pick in that first draft lottery conducted in December 1969 on nationwide television. I had been accepted at Harvard Law School, but instead I had to go into the Army. I asked HLS to defer my acceptance until I completed active duty, but it had a policy of not deferring admission for military service. So I reapplied a year later and got accepted again. I'm one of the few people who has two separate acceptance letters from Harvard Law School!

**What were your career plans when you graduated?**

My favorite course was Professor David Herwitz's Business Planning, and my goal was to get into real estate and corporate law. Early on I did a lot of property and M&A transactions and loved it. In 1981, I made the switch to investment banking and went into the real estate department of Morgan Stanley.

**The real estate market crashed not too long after you entered the field. How did that affect you?**

I spent two years restructuring real estate investment trusts, working through bankruptcies and doing asset-swap programs involving loan cancellations. During the good times, you don't have to worry. But when an industry crashes and burns, that's when you really dig in and can learn a great deal.

**How did you segue into being the chairman of the board of a listed hotel company?**

At Morgan Stanley, one of the groups I ran was the lodging and leisure group. I spent a lot of my time as a real estate fund investor, and we actually bought a hotel company with 300 hotels, Red Roof Inns. I served as chairman of the board, and we took it public on the New York Stock Exchange. It was

later sold to the French hotel company Accor. I went from being counsel, to investment banker, to chairman of the board of a publicly traded hotel company—all under the Morgan Stanley umbrella.

**What inspired you to move to Greenhill?**

I enjoyed Morgan Stanley, and I was there until 1996. Its former president, Bob Greenhill, established a new investment bank, and he asked me to join him and start a real estate fund. We've been fortunate with our success, and we took the firm public three years ago. We're currently investing our third Barrow Street Real Estate Fund, which buys and develops real estate projects across the nation.

**In addition to supporting HLS, you are also involved with the Harvard College Parents Fund.**

My wife, Alice, and I have been national co-chairs for the last nine years. We've been blessed to have our three children, Molly,

Christina and Peter, attend Harvard College. Our son-in-law, Ted Fienning, is also an alumnus of the college. We're also very involved in a variety of charities supporting education and serving the poor and sick, many sponsored by the Catholic Church.

**When a young person asks for career advice, what do you say?**

In terms of professional education, I encourage them to study law. I've used my HLS degree in four different career paths—in private practice at Cleary Gottlieb, in finance at Morgan Stanley, in real estate investing at Greenhill and also for annual lecturing at Cornell University. The J.D. is an excellent tool to have in your kit! \*

Peter C. Krause is managing director of Greenhill & Co., a merchant bank with offices in New York City, Dallas, Toronto, London and Frankfurt. He serves as chair of its Barrow Street Real Estate Funds. Previously, Krause was managing director at Morgan Stanley. He also practiced at Cleary Gottlieb Steen & Hamilton and Schulte Roth & Zabel. Since 2005, he has been chair of the HLS Fund.



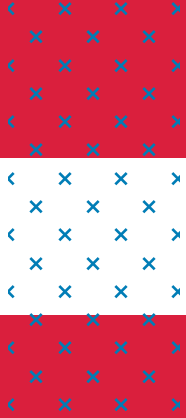
## 200 tons, 175 yards, 5 hours

*As of fall 2008, in their new location on Massachusetts Avenue, the three historic houses will serve as living quarters for students.*



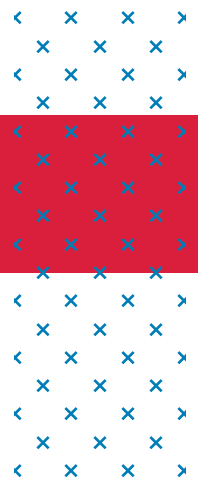
One year of planning came down to five hours of drama on June 23, 2007, when three Victorian-era buildings on the Harvard Law School campus were relocated 175 yards up Massachusetts Avenue to make way for the Northwest Corner development, a major new academic complex slated for completion in 2011. A section of an HLS dormitory at the destination on Mass. Ave. was demolished to make space for the houses. Traffic was diverted, and street signs, parking meters and traffic signals were removed. Pictured below: The heaviest of the three buildings, weighing more than 200 tons, was moved by 16 hydraulic dollies, at walking speed.





**PRO:** “Congress possesses substantial constitutional authority to regulate ongoing military operations and even to bring them to an end.” —PROFESSOR DAVID BARRON ’94

**CON:** “Once Congress has authorized the president to fight, it has neither the competence nor the authority to tell him which troops should be placed where on the battlefield. Nor can it order him to withdraw particular troops—or particular numbers of troops—by a specified date.”  
—PROFESSOR NOAH FELDMAN



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